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CHAPTER 10

Privileges and Immunities

A. FOREIGN SOVEREIGN IMMUNITIES ACT

The Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1441, 1602–1611, governs civil actions against foreign states in U.S. courts. The FSIA's various statutory exceptions to a foreign state's immunity from the jurisdiction of U.S. courts, set forth at 28 U.S.C. §§ 1605(a)(1)–(6), 1605A, 1605B, and 1607, have been the subject of significant judicial interpretation in cases brought by private entities or persons against foreign states. Accordingly, much of U.S. practice in the field of sovereign immunity is developed by U.S. courts in litigation to which the U.S. government is not a party and in which it does not participate. The following section discusses a selection of the significant proceedings that occurred during 2019 in which the United States filed a statement of interest or participated as amicus curiae.

1. Commercial Activities Exception: *Argentine Republic v. Petersen*

The commercial activities exception in the FSIA provides:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
> ***
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. 1605(a)(2).

On May 21, 2019, the United States filed an amicus brief recommending the U.S. Supreme Court deny certiorari in *Argentine Republic v. Petersen Energia Inversora S.A.* No. 18-581, a case concerning the commercial activities exception. Both the district court and the court of appeals found that Argentina was not immune from suit because its acts (and those of YPF S.A., an Argentine petroleum company) of entering into and repudiating contractual obligations caused the complained-of harm. The Supreme Court denied certiorari on June 24, 2019. Excerpts follow from the U.S. brief.

* * * *

This Court should deny the petitions for writs of certiorari. The court of appeals correctly ruled that the FSIA's commercial-activity exception applies to this case. Contrary to petitioners' assertions, the court's decision does not conflict with any decision of another court of appeals. To be sure, the scope of the commercial-activity exception is an important issue, but this case would not be a suitable vehicle for addressing the scope of that exception…

1. a. The court of appeals correctly ruled that the commercial-activity exception applies to this case.

The FSIA provides that a foreign state is not immune from suit in any case that is "based" "upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. 1605(a)(2). The key terms for purposes of this case are "based upon" and "commercial." This Court has explained that "an action is 'based upon' the 'particular conduct' that constitutes the 'gravamen' of the suit." *OBB Personenverkehr AG* v. *Sachs*, 136 S. Ct. 390, 396 (2015) (citing *Saudi Arabia* v. *Nelson*, 507 U.S. 349 (1993)). The inquiry "zeroe[s] in" on the "acts that actually injured" the plaintiff. *Ibid.*

This Court has also explained that a foreign state's act is "'commercial'" where the foreign state acts "in the manner of a private player within" a market—in other words, where "the particular actions that the foreign state performs" "are the *type* of actions by which a private party engages in 'trade and traffic or commerce.' " *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607, 614 (1992) (citation omitted). Because the FSIA expressly provides that "the commercial character of an act is to be determined by reference to its 'nature' rather than its 'purpose,' " the inquiry turns on the "outward form of the conduct" rather than on "the *reason* why the foreign state engages in the activity." *Id.* at 614, 617 (quoting 28 U.S.C. 1603(d)). In addition, the Court has observed that the commercial-activity exception refers separately to actions that are "based upon a commercial activity * * * in the United States" and actions that are "based upon an act * * * *in connection with* a commercial activity * * * elsewhere." *Nelson*, 507 U.S. at 356-357 (quoting 28 U.S.C. 1605(a)(2)) (emphasis added; ellipsis omitted). The Court has concluded that the phrase "based upon an act *in connection with* commercial activity" extends further than the phrase "based upon a commercial activity." See *id.* at 357-358.

Under these principles, Petersen's claims are "based upon" Argentina's and YPF's alleged breaches of the contractual obligations set out in YPF's bylaws. The "gravamen" of Petersen's claims against Argentina is that Argentina violated its promise to Petersen (and other purchasers of YPF's shares) by repudiating its obligation to extend a tender offer for those shares. And the "gravamen" of Petersen's claims against YPF is that YPF violated its promise to

Petersen (and other purchasers of YPF's shares) by failing to enforce the bylaws' provisions and penalties concerning such tender offers.

These alleged breaches are themselves "commercial" —and, *a fortiori*, are acts performed "in connection with a commercial activity." In making promises to induce investors to buy shares, and in later repudiating those promises, Argentina and YPF acted "in the manner of a private player" in a market, engaging in "the type of actions" in which private entities routinely engage. *Weltover*, 504 U.S. at 614 (emphasis omitted). The commercial character of the breach is also reflected in the fact that the bylaws' tender-offer requirement applied to *any* person who acquired a sufficiently large stake in the company, not just to Argentina. … A private party's failure to comply with the tender-offer requirement would plainly be commercial. Such a failure does not become any less commercial merely because the alleged violator is instead a foreign state.

b. Petitioners' contrary arguments are incorrect.

Petitioners first contend … that this lawsuit falls outside the commercial-activity exception because their alleged violations of the bylaws were "inextricably intertwined with" the sovereign act of expropriating Repsol's shares—that they "directly followed from," were "the direct result of," and occurred "in connection with" the expropriation. Under this Court's cases, however, the " 'based upon' " inquiry "zeroe[s] in on" the "acts that actually injured" the plaintiff. *Sachs*, 136 S. Ct. at 396 (quoting *Nelson*, 507 U.S. at 358). For example, in *Nelson*, an American citizen claimed that Saudi Arabia recruited him to work overseas, but then imprisoned and tortured him. 507 U.S. at 352-354. This Court held that the ensuing lawsuit for unlawful detention and torture was "'based upon'" the alleged detention and torture, not upon the preceding acts of recruitment and employment, even though "these activities led to the conduct that eventually injured" the plaintiff. *Id.* at 358. Similarly, in *Sachs*, an American citizen bought a ticket in the United States for railway travel in Europe, and then suffered an accident while attempting to board a train in Austria. 136 S. Ct. at 393. This Court held that the ensuing personal-injury lawsuit was "'based upon'" the "episode in Austria," not upon the preceding sale of the ticket. *Id.* at 396. Similarly here, Petersen's breach-of-contract lawsuit is based upon the alleged violation of the tender-offer rules in YPF's bylaws. Argentina's sovereign act of expropriation led to that alleged violation, but that does not make the expropriation the basis of the lawsuit.

Petitioners also contend that a lawsuit for the violation of the tender-offer requirements amounts to a challenge to the expropriation itself, and that allowing this lawsuit to proceed would enable plaintiffs to "circumvent the requirements of the [separate] 'expropriation exception' to sovereign immunity" in 28 U.S.C. 1605(a)(3). … That contention is mistaken. Petersen's lawsuit does not contest the validity of the expropriation. The bylaws' tender-offer requirements apply to private parties as well as to Argentina, and they come into play when either a private party or Argentina becomes the owner of more than a specified percentage of YPF's shares "by any means or instrument." … For instance, if Argentina purchased a controlling stake of YPF on the open market, instead of expropriating the stake from Repsol, it would have been required to extend a tender offer for the remaining shares. … The way in which Argentina acquired the shares and the legality of that action are thus irrelevant to the contractual obligation and to Petersen's breach-of-contract claim. For this reason, this lawsuit is not based upon the expropriation, and it is not an indirect means of challenging the propriety of the expropriation.

Petitioners nonetheless insist that a lawsuit based upon the failure to extend a tender offer *does* amount to a challenge to the expropriation, because the Expropriation Law itself required Argentina to acquire "*exactly* 51% of the shares of YPF" and to vote those shares. …This argument is flawed in two respects. First, a breach of a commercial obligation does not cease to be commercial simply because a statute or regulation commands the breach. For example, in *Weltover*, this Court held that the commercial-activity exception covered a lawsuit against Argentina for failing to make timely payments on its bonds, even though Argentina ceased making the payments "[p]ursuant to a Presidential Decree." 504 U.S. at 610; see *id.* at 615-617. The Court emphasized that the bonds were "in almost all respects garden-variety debt instruments: They [could] be held by private parties; they [were] negotiable and [could] be traded on the international market * * * ; and they promise[d] a future stream of cash income." *Id.* at 615. So too here, the commercial-activity exception covers Petersen's lawsuit against Argentina and YPF for failing to honor contractual promises, even though petitioners contend that they failed to honor those promises because of the Expropriation Law. Shares in YPF are garden-variety equity instruments, and petitioners' promises regarding those shares are garden-variety contractual commitments.

Second, the court of appeals in any event rejected petitioners' premise that the Expropriation Law required Argentina to acquire exactly 51% of the shares of YPF and prohibited it from extending a tender offer for further shares. The court "s[aw] no reason why Argentina could not have complied with both the bylaws' tender offer requirements and the YPF Expropriation Law." … And it determined that "no provision in the YPF Expropriation Law" "compelled Argentina to 'acquire *exactly* 51% ownership in YPF' and no greater ownership position." … Citing this Court's decision in *Animal Science Products, Inc.* v. *Hebei Welcome Pharmaceutical Co.*, 138 S. Ct. 1865 (2018), the court of appeals accorded "respectful consideration to Argentina's [contrary] views," but in the end the court was "not persuaded." …Argentina now contests … the court's interpretation of Argentine law, but a case-specific dispute regarding the meaning of Argentine law does not warrant this Court's review. Quite the opposite, such case-specific and fact-bound disputes make this case a poor vehicle for addressing the scope of the commercial-activity exception.

2. Contrary to petitioners' contentions…, the court of appeals' decision does not conflict with decisions of the D.C. Circuit. Petitioners' claim of a circuit conflict rests principally on *Rong* v. *Liaoning Province Government*, 452 F.3d 883 (D.C. Cir. 2006). In that case, a Chinese province expropriated the plaintiff s' ownership rights in a joint venture, put government officials in charge of the venture, and transferred shares in venture to a different company. *Id.* at 885-887. The plaintiffs sued the province in federal district court, claiming that the province had "wrongfully taken" and wrongfully exercised ownership rights. *Id.* at 889 (citation omitted). The D.C. Circuit held that the commercial-activity exception did not apply to the lawsuit, because it was "based" upon the sovereign act of expropriating the plaintiffs' property. *Id.* at 888; see *id.* at 888-890. The court added that the province's "subsequent acts"—such as putting government officials in charge of the venture and transferring shares in the venture—"did not transform the Province's expropriation into commercial activity." *Id.* at 890.

The court of appeals' decision in this case is consistent with the D.C. Circuit's decision in *Rong*. *Rong* was based upon an expropriation, because the plaintiffs there challenged the expropriation of their shares. In contrast, this case is not based upon an expropriation, because Petersen does not challenge the expropriation of its own or anyone else's shares. Rather, it challenges only the alleged failure to comply with contractual tender-offer requirements.

The decision in this case is also consistent with the D.C. Circuit's treatment in *Rong* of the acts that occurred after the expropriation. The plaintiffs there challenged the post-expropriation acts—such as replacing the joint venture's management and transferring the joint venture's shares—on the ground that the initial expropriation was itself unlawful. They did not contend that the acts were unlawful for any reason apart from the alleged unlawfulness of the expropriation itself. It was thus clear in *Rong* that the expropriation was the gravamen of the lawsuit. In this case, by contrast, Petersen does not challenge Argentina's failure to extend a tender-offer and YPF's failure to enforce the tender-offer requirement on the ground that Argentina's expropriation of Repsol's shares was unlawful. Quite the contrary, Petersen accepts the validity of the expropriation, contesting only the failure to take further acts (such as extending a tender offer) in addition to that expropriation. So in this case, unlike in *Rong*, the expropriation is not the gravamen of the lawsuit.

Indeed, *Rong* and this case are mirror images of one another. In both cases, the governing legal principle is that the court must focus on the character of "the specific activity upon which the claim is based," not "general activity related to the claim." *Rong*, 452 F.3d at 891 (citation omitted). In *Rong*, the lawsuit fell outside the commercial-activity exception because it was based upon an expropriation, and that result did not change merely because the expropriation had a relationship with commercial activities. Here, the lawsuit falls within the commercial-activity exception because it is based upon a breach of a commercial contractual obligation, and that result does not change merely because the breach has a relationship with an expropriation.

The D.C. Circuit's decision in *de Csepel* v. *Republic of Hungary*, 714 F.3d 591 (2013), which the Second Circuit cited here, … confirms that the decision below does not conflict with the D.C. Circuit's decisions. In *de Csepel*, the D.C. Circuit held that the commercial-activity exception applied to Hungary's alleged breach of bailment agreements to care for artwork expropriated during the Holocaust. 714 F.3d at 599-600. The court reasoned that a "foreign state's repudiation of a contract is precisely the type of activity in which a 'private player within the market' engages." *Id.* at 599 (citation omitted). The court recognized that the initial expropriation was a sovereign act, *id.* at 600, but concluded that the suit was based upon the alleged breach of the bailment agreements rather than the preceding expropriation. The court explained that, by allegedly "entering into bailment agreements" "and later breaching those agreements by refusing to return the artwork," the foreign state "took affirmative acts beyond the initial expropriation." *Ibid.* Likewise here, the lawsuit is based upon distinct conduct—Argentina's failure to extend a tender offer and YPF's failure to enforce the tender-offer requirement—that goes beyond and is separate from the initial expropriation.

Petitioners separately contend … that the Ninth Circuit's 26-year-old decision in *Siderman de Blake* v. *Republic of Argentina*, 965 F.2d 699 (1992), cert. denied, 507 U.S. 1017 (1993), conflicts with the D.C. Circuit's decision in *Rong*. As an initial matter, the claim that *Siderman* conflicts with *Rong* is not a basis for granting a writ of certiorari in *this* case, which does not conflict with *Rong*. In addition, petitioners overstate the conflict between *Siderman* and *Rong*. In *Siderman*, the Ninth Circuit applied the same legal test that the D.C. Circuit applied in *Rong* and that the Second Circuit applied here; the Ninth Circuit first identified the "activities that form[ed] the basis for the claims," and it asked whether those activities are "'of a kind in which a private party might engage.'" *Id.* at 708-709. Petitioners disagree … with the Ninth Circuit's application of that legal standard to the facts of that case, but disagreement with the application of a legal standard in another case is not a reason for granting review in this case.

3. Petitioners contend … that the scope of the commercial-activity exception involves important issues. This case, however, would be a poor vehicle for addressing the scope of the exception, because much of petitioners' argument rests on a disagreement with the court of appeals' interpretation of Argentine law and YPF's bylaws. Petitioners contend that the alleged breaches of the bylaws are "inextricably intertwined" with the expropriation because the Expropriation Law itself required Argentina to acquire "*exactly* 51% of the shares of YPF" and to vote those shares. … But as discussed above…, the court rejected that interpretation of Argentine law. Argentina maintains … that this Court "need not address any factual disputes as to the meaning of the Expropriation Law or YPF's bylaws," but it is hard to see how that can be so, when its assertions that the commercial activities are inextricably intertwined with the expropriation rest on the premise … that "[m]aking a tender offer would have been incompatible with the Expropriation Law."

Petitioners contend that the decision below threatens to upset "exceptionally important and sensitive interests," … and to interfere with the United States' "foreign relations," on account of its effects on Argentina and "also countless other foreign states," …. The United States is sensitive to these concerns and agrees that the commercial-activity exception should not be applied in a manner that risks infringing on a foreign state's sovereignty or undermining the carefully calibrated scope of the FSIA's expropriation exception. But the decision below, which turns on the facts of this particular case and the character of Petersen's particular claims, is unlikely to lead to such results. In addition, the United States has a countervailing interest in ensuring that foreign states that enter U.S. markets as commercial actors do not enjoy immunity from lawsuits regarding violations of their commercial obligations. Here, Argentina conducted an initial public offering for YPF on the New York Stock Exchange, and it specifically advertised YPF's bylaws in order to attract investors. The FSIA provides for jurisdiction over Argentina and YPF to resolve this commercial dispute regarding alleged violations of those bylaws that caused a direct effect in the United States.

* * * *

2. Expropriation Exception to Immunity: *de Csepel v. Hungary*

The expropriation exception to immunity in the FSIA provides that a foreign state is not immune from any suit "in which rights in property taken in violation of international law are in issue" and a specified commercial-activity nexus to the United States is present. 28 U.S.C. § 1605(a)(3).

In *de Csepel v. Republic of Hungary*, No. 17-1165, the U.S. Supreme Court denied the petition for certiorari on January 7, 2019. The case concerns the scope of the expropriation exception to the FSIA in the context of an art collection taken during the Holocaust era. The district court held that Hungary was not immune and the court of appeals reversed. The United States amicus brief (filed December 4, 2018), asserting that the court of appeals was correct and that further review is not warranted, is excerpted below (with footnotes and record cites omitted).

_____

* * * *

The United States deplores the acts of oppression committed against the Herzog family, and supports efforts to provide them with a measure of justice for the wrongs they suffered. Nevertheless, consistent with the United States' longstanding position, the court of appeals' decision is correct. The respondent museums and university that possess the artworks are not immune from suit under the FSIA's expropriation exception because of their book sales and other commercial activities in the United States. But those commercial activities of the state museums and university provide no basis for haling Hungary itself into court. The expropriation exception permits courts to exercise jurisdiction over a foreign state for expropriating property only when the property is in the United States in connection with the foreign state's *own* commercial activities in the United States. The court of appeals' decision also does not conflict with any reasoned decision of any other court of appeals. Further review is unwarranted.

I. THE COURT OF APPEALS' DECISION IS CORRECT

The court of appeals correctly determined that, under the FSIA's expropriation exception, U.S. book sales or other commercial activities by Hungarian state museums and a university may provide a basis for exercising jurisdiction over those entities—but provide no basis for exercising jurisdiction over Hungary itself. A foreign state is a legal entity separate from its agencies or instrumentalities. A foreign state is subject to suit only if the expropriated property is present in the United States in connection with its own commercial activities in the United States. Here, the artworks remain in Hungary, so Hungary is immune from suit.

A. The resolution of the question presented depends on interpreting the "rather abstruse" text of Section 1605(a)(3). … It provides, in relevant part:

> (a) A foreign state shall not be immune from [suit] in any case—
>
> *****
>
> (3) in which [expropriated property is] in issue and that property * * * is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property * * * is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.

28 U.S.C. 1605(a)(3). The exception thus contains two distinct nexus tests. The first (addressing the link to U.S. activities of "the foreign state") is much more demanding than the second (addressing the link to U.S. activities of "an agency or instrumentality"). *Ibid.* The first is satisfied only when the property is present in the United States in connection with commercial activities "carried on in the United States by the foreign state" itself. *Ibid.* The second can be satisfied even if the property is still abroad, and even if the property itself is not being used in the U.S. commercial activities of the agency or instrumentality. See, *e.g.*, *Agudas Chasidei Chabad of U.S.* v. *Russian Fed'n*, 528 F.3d 934, 947-958 (D.C. Cir. 2008) (concluding the second clause's "commercial activity" requirement was satisfied by contracts for publication of materials unrelated to the allegedly expropriated property).

As this case comes to the Court, it is undisputed that the "foreign state" nexus has not been satisfied. The artworks are in Hungary, not the United States. It is also undisputed that the "agency or instrumentality" nexus has been satisfied as to respondent museums and university, on the basis that those entities possess the artworks and engage in U.S. commercial activities,

including through selling books in the United States. *Id.* at 17a. The only question is whether the U.S. commercial activities of the museums and university also provide a basis for suing *Hungary itself* under the second nexus. That is, do the U.S. book sales by a state museum or university provide a basis for subjecting Hungary itself to the jurisdiction of U.S. courts? The court of appeals correctly determined that the answer is no.

B. 1. The statutory text and structure are properly read to support the court of appeals' interpretation. Section 1605(a), which sets forth the general exception to immunity, opens with introductory language indicating the entity that could lose its immunity from suit ("[a] foreign state shall not be immune from" suit"), 28 U.S.C. 1605(a), and the statutory definition of "foreign state" establishes that the entity can be either a foreign state or an agency or instrumentality, see 28 U.S.C. 1603(a). The introduction is then followed by separate paragraphs setting forth each of those exceptions. Subsection (a)(3) addresses expropriation claims, which contains two distinct commercial-nexus requirements: a more demanding test depending on U.S. activities of "the foreign state," and a more forgiving test depending on U.S. activities of an "agency or instrumentality. 28 U.S.C. 1605(a)(3).

That text and structure as a whole is most naturally read as establishing two distinct tracks for obtaining jurisdiction, depending on the kind of entity whose immunity is at stake. If the entity is the foreign state itself, then the stricter "foreign state" nexus must be satisfied; if the entity is an agency or instrumentality, then the looser "agency or instrumentality" nexus must be satisfied. To put it another way, the statute is naturally read to require that the entity that loses its immunity (the "foreign state" in the introductory paragraph) must be the same entity whose commercial activities in the United States subject it to jurisdiction of a U.S. court. On that understanding, an entity's exposure to suit in U.S. courts depends on the connection between the expropriated property and *that entity's own* U.S. commercial activities. A plaintiff thus cannot mix and match, using the looser "agency or instrumentality" standard to bootstrap jurisdiction over the foreign state itself. …

2. The statutory context, history, and purpose powerfully support that interpretation. At the outset, it is natural to understand a U.S. court's jurisdiction over a foreign defendant to depend on that entity's contacts with the United States—and not the contacts of some other, separate entity. If a private foreign museum engaged in commercial activity in the United States, for example, then that activity would naturally be expected to provide a basis for suing that museum on related claims in a U.S. court. Cf. *J. McIntyre Mach., Ltd.* v. *Nicastro*, 564 U.S. 873, 881 (2011) (opinion of Kennedy, J.); *id.* at 887-888 (Breyer, J., concurring in the judgment). But that activity would not ordinarily provide a basis for suing a separate corporate parent (like a foundation that owns the museum) that did not itself engage in those activities itself. See *Keeton* v. *Hustler Magazine, Inc.*, 465 U.S. 770, 781 n.13 (1984) ("[J]urisdiction over a parent corporation [does not] automatically establish jurisdiction over a wholly owned subsidiary"); *Holland Am. Line, Inc.* v. *Wärsilä N. Am., Inc.*, 485 F.3d 450, 459 (9th Cir. 2007) ("[A]s a general rule, where a parent and a subsidiary are separate and distinct corporate entities, the presence of one" in a forum "may not be attributed to the other."); *Escude Cruz* v. *Ortho Pharm. Corp.*, 619 F.2d 902, 905 (1st Cir. 1980) ("The mere fact that a subsidiary company does business within a state does not confer jurisdiction over its nonresident parent, even if the parent is sole owner of the subsidiary."); see also *Daimler AG* v. *Bauman*, 571 U.S. 117, 134-136 (2014) (rejecting argument that a court may exercise general jurisdiction over a corporate parent merely because an in-state subsidiary is engaged in business the parent would do by other means if the subsidiary did not exist).

The expectation that jurisdiction over a foreign entity depends on that entity's own contacts with the United States is particularly strong in the FSIA, a statute addressing the immunity of foreign sovereigns from suit in U.S. courts. As this Court has long recognized, "[d]ue respect for the actions taken by foreign sovereigns and for principles of comity between nations" support a background rule "that government instrumentalities established as juridical entities distinct and independent from their sovereign *should normally be treated as such*." *First Nat'l City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 623, 626- 627 (1983) (*Bancec*) (emphasis added); see H.R. Rep. No. 1487, 94th Cong., 2d Sess. 29 (1976) (House Report) (noting the interest in "respect[ing] the separate juridical identities of different [foreign state] agencies or instrumentalities").

Accordingly, "as a default" under the FSIA, agencies and instrumentalities of a foreign state are "to be considered separate legal entities" from the foreign state itself, and veil piercing is limited to relatively unusual circumstances. *Rubin* v. *Islamic Republic of Iran*, 138 S. Ct. 816, 822 (2018); see *id.* at 823 (discussing the *Bancec* test for overcoming the presumption and allowing veil piercing); see also *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 476 (2003); *Bancec*, 462 U.S. at 629-630. The "conduct of an agency or instrumentality" in turn "ordinarily may not be imputed to the foreign state" itself. See Restatement (Fourth) of the Foreign Relations Law of the United States § 452 cmt. g (2018).

When applying other FSIA exceptions to immunity from suit, the courts of appeals have consistently recognized that a foreign state "does not lose immunity merely because one of its agencies and instrumentalities satisfies an FSIA exception." For example, under the FSIA's commercial activity exception, 28 U.S.C. 1605(a)(2), the courts of appeals have applied the presumption to hold that "a foreign sovereign is not amenable to suit based upon the acts" of an instrumentality, unless the *Bancec* presumption is overcome. *Transamerica Leasing, Inc.* v. *La Republica de Venezuela*, 200 F.3d 843, 848 (D.C. Cir. 2000); accord *Hester Int'l Corp.* v. *Federal Republic of Nigeria*, 879 F.2d 170, 175-179 (5th Cir. 1989). Courts of appeals have likewise applied the presumption of separateness in addressing claims under other FSIA exceptions. See *First Inv. Corp. of Marshall Islands* v. *Fujian Mawei Shipbuilding, Ltd.*, 703 F.3d 742, 756 (5th Cir. 2012) (applying *Bancec* factors to the FSIA's arbitration exception, 28 U.S.C. 1605(a)(6)); *Doe* v. *Holy See*, 557 F.3d 1066, 1078-1079 (9th Cir. 2009) (per curiam) (same under tortious act exception, 28 U.S.C. 1605(a)(5)), cert. denied, 561 U.S. 1024 (2010). The court of appeals' interpretation here is consistent with that approach…

Moreover, when Congress has departed from that background rule under the FSIA, it has done so expressly. In 28 U.S.C. 1610(g)(1), Congress expressly abrogates the background rule respecting the separateness of different entities, and facilitates veil piercing between the foreign state and its agencies or instrumentalities—but only for the limited purpose of enabling victims of state-sponsored terrorism to enforce certain money judgments. See *Rubin*, 138 S. Ct. at 823 (Section 1610(g) "abrogate[s] *Bancec* with respect to the liability of agencies and instrumentalities of a foreign state where a [terrorism] judgment holder seeks to satisfy a judgment held against the foreign state."). The expropriation exception to immunity from suit, by contrast, includes no language that is even remotely similar. That silence is properly understood to indicate that Congress did not intend to depart from the background rule, and thus did not intend for U.S. courts to assert jurisdiction over a foreign state based on U.S. activities of an agency or instrumentality.

3. The court of appeals' interpretation finds further support in the common-sense point that it is more delicate for a court to exercise jurisdiction over a foreign state than over an agency

or instrumentality. This theme permeates the FSIA. For example, the FSIA generally makes the property of a foreign state, agency, or instrumentality immune from execution. See 28 U.S.C. 1609. But the exceptions to immunity from execution are broader for property of an agency or instrumentality. See 28 U.S.C. 1610(b). It is therefore more difficult to execute against the property of the foreign state itself. Similarly, the FSIA permits punitive damages only against agencies or instrumentalities, but not foreign states themselves (with limited exceptions). See 28 U.S.C. 1606. And it provides more permissive procedures for effecting service against an agency or instrumentality than against the foreign state itself. See 28 U.S.C. 1608.

The court of appeals' interpretation of the expropriation exception is consistent with that basic statutory structure, because it provides greater immunity for a foreign sovereign than for an agency or instrumentality. Petitioners' interpretation, by contrast, would break from that framework: A foreign state and an agency or instrumentality would be equally subject to suit under the second exception. Indeed, so long as an agency or instrumentality is subject to suit, the foreign state would be automatically subject to suit as well. It is very unlikely that Congress adopted in the FSIA such a means for enabling U.S. courts to engage in the delicate task of exercising jurisdiction over a foreign state.

Even more oddly, under petitioners' interpretation, the "agency or instrumentality" nexus would apparently strip immunity from *every* agency or instrumentality whenever *one* such entity owns or operates expropriated property and engages in commercial activity in the United States: That agency or instrumentality would be a "foreign state" under the introductory language in Section 1605(a), and there would be no evident need for that to be the same entity whose contacts satisfy the commercial-nexus requirement. See 28 U.S.C. 1605(a)(3). Accordingly, so long as a plaintiff established jurisdiction over one agency or instrumentality, it could also sue the foreign state itself *and every other agency or instrumentality*, even if they do not "own or operate" the expropriated property or engage in any "commercial activity" in the United States. *Ibid.* Again, it is very unlikely that Congress intended for jurisdiction to be "dispensed in gross," *Gill* v. *Whitford*, 138 S. Ct. 1916, 1934 (2018) (citation omitted), particularly given the background rule respecting the separate juridical status of each agency or instrumentality.

4. The FSIA's provisions for execution immunity further support the court of appeals' interpretation. The FSIA comprehensively addresses both immunity from suit and immunity from execution. *Republic of Argentina* v. *NML Capital, Ltd.*, 134 S. Ct. 2250, 2255-2256 (2014). For execution, the FSIA provides (subject to certain international agreements) that the property in the United States of a foreign state, agency, or instrumentality is immune from execution, except as provided in 28 U.S.C. 1610 and 1611. See 28 U.S.C. 1609. In general, the FSIA's exceptions to execution immunity parallel its exceptions to jurisdictional immunity. See House Report 27 (noting that Section 1610 was drafted to make execution immunity "conform more closely with the provisions on jurisdictional immunity"). Like Section 1605 for jurisdictional immunity, Section 1610 includes exceptions to execution immunity for cases involving expropriation: a narrower exception for the property of a foreign state, agency, or instrumentality, and a broader exception for the property of an agency or instrumentality. See 28 U.S.C. 1610(a)(3) and (b).

Under the court of appeals' interpretation, Section 1610's execution provisions parallel Section 1605's jurisdictional immunity provisions. For the foreign state itself, there is a narrow exception for both immunity from suit and immunity from execution, which applies if the foreign state brings the expropriated property to the United States in connection with the state's own commercial activity here; the state could be sued and that property executed against when in

the United States. 28 U.S.C. 1605(a)(3), 1610(a)(3). For an agency or instrumentality, the exceptions are somewhat broader but still parallel to each other: If an agency or instrumentality owns or operates the expropriated property and it engages in U.S. commercial activities, regardless of whether there is a further connection between the two, then the entity would be subject to suit and its U.S. property would be subject to execution. 28 U.S.C. 1605(a)(3), 1610(b).

Under petitioner's interpretation, however, the parallelism would break down: A plaintiff could hale a foreign state into court based on the U.S. commercial activities of one of its agencies or instrumentalities—but the U.S. commercial activities of the agency or instrumentality would provide no basis for executing against the property of the foreign state.

5. Finally, the historical treatment of expropriation claims before Congress enacted the FSIA supports the court of appeals' view. Before the FSIA, foreign states enjoyed immunity from suit arising out of the expropriation of property within their own territory, see, *e.g.*, *Isbrandtsen Tankers, Inc.* v. *President of India*, 446 F.2d 1198, 1200 (2d Cir.), cert. denied, 404 U.S. 895 (1971), with the possible exception of in rem cases in which U.S. courts took jurisdiction to determine rights to property in the United States. *E.g.*, *Stephen* v. *Zivnostenska Banka*, 15 A.D.2d 111, 119 (N.Y. App. Div. 1961), aff 'd, 186 N.E.2d 676 (1962) (per curiam). In contrast, the State Department had expressed the view that "agencies of foreign governments engaged in ordinary commercial transactions in the United States enjoyed no privileges or immunities not appertaining to other foreign corporations, agencies, or individuals doing business here." *United States* v. *Deutsches Kalisyndikat Gesellschaft*, 31 F.2d 199, 200 (S.D.N.Y. 1929). In creating for the first time an exception to the in personam immunity of a foreign state for cases involving expropriated property, Congress adopted an incremental approach granting jurisdiction over foreign states that paralleled those few cases in which title to property in the United States had been in issue, while permitting, as had previously been the case, a broader class of suits against agencies and instrumentalities. The court of appeals' interpretation is consistent with that incremental approach, whereas petitioners' interpretation would mark a dramatic shift from prior practice.

II. THIS COURT'S REVIEW IS NOT WARRANTED

1. As discussed above, the court of appeals correctly determined that a foreign state is not subject to the jurisdiction of U.S. courts under the FSIA's expropriation exception based solely on the U.S. commercial activities of one of its agencies or instrumentalities. That decision is also in accord with the only other court of appeals decision to discuss the question. See *Garb* v. *Republic of Poland*, 440 F.3d 579, 589 (2d Cir. 2006) (concluding, albeit in dicta, that the first clause of the expropriation exception "sets a higher threshold of proof for suing foreign states in connection with alleged takings").

Petitioners correctly note that the Ninth Circuit has twice permitted the exercise of jurisdiction over a foreign state when only the second clause of the expropriation exception was satisfied. See *Cassirer* v. *Kingdom of Spain*, 616 F.3d 1019, 1022, 1028-1034 (2010) (en banc), cert. denied, 564 U.S. 1037 (2011); *Altmann* v. *Republic of Austria*, 317 F.3d 954, 968-969 (2002), aff 'd, 541 U.S. 677 (2004). But neither of those decisions analyzed or explained the basis for exercising jurisdiction over the foreign state itself; they instead examined jurisdiction only as to the agency or instrumentality defendants. See *Arch Trading Corp.* v. *Republic of Ecuador*, 839 F.3d 193, 206 (2d Cir. 2016) (noting that *Cassirer* provided no "independent analysis" of jurisdiction over the foreign state itself). In *Altmann*, for example, the Ninth Circuit concluded that the publication and marketing of books and an art exhibition in the United States

by the Austrian Gallery (an agency or instrumentality of Austria) qualified as U.S. commercial activities, and in turn provided a basis for jurisdiction over the Gallery. 317 F.3d at 968-969. But the court did not address why the Gallery's books sales and other U.S. commercial activities rendered Austria itself subject to jurisdiction.

Thus, no reasoned decision of a court of appeals differs from the decision below. A panel of the Ninth Circuit apparently could conclude, after full consideration, that the view taken by the court of appeals in this case is correct—just as the court of appeals here determined that it was not bound by the earlier but unreasoned D.C. Circuit decision in *Chabad*. …

* * * *

3. Noncommercial Tort Exception to Immunity: *Merlini v. Canada*

The noncommercial-tort exception to immunity in the FSIA provides that a foreign state is not immune from any action "not otherwise encompassed" by the commercial-activity exception, in which "money damages are sought against a foreign state for personal injury … occurring in the United States and caused by the tortious act or omission of" that government's employee "while acting within the scope of his office or employment." 28 U.S.C. § 1605(a)(5).

In *Merlini v. Canada*, No. 17-2211, the United States filed an amicus brief in the Court of Appeals for the First Circuit on February 25, 2019, recommending the court of appeals reverse the district court's decision that the complaint was based on commercial activity and remand for further proceedings, or, in the alternative, affirm, if the court agrees that the gravamen of the action is Canada's choice of workers' compensation system. On June 10, 2019, the First Circuit reversed the district court, but on grounds other than those advanced in the U.S. brief. *Merlini v. Canada*, 926 F.3d 21 (1st Cir. 2019). On October 23, 2019, by a 3-3 decision, the First Circuit denied rehearing en banc.

4. Terrorism Exception to Immunity: *Sudan v. Opati*

The tort exception to immunity in the FSIA provides that a foreign state is not immune in actions "for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission" of a foreign state. 28 U.S.C. § 1605(a)(5). The FSIA's definitions section specifies that "[t]he 'United States' includes all territory and waters, continental or insular, subject to the jurisdiction of the United States." *Id*. § 1603(c).

The terrorism exception applies, *inter alia*, to cases in which money damages are sought for "personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act … engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency." 28 U.S.C. § 1605A(a)(1). The provision further specifies that "[t]he court shall hear a claim under this section if" certain additional requirements are met, *id*. § 1605A(a)(2),

including that "the foreign state was designated as a state sponsor of terrorism at the time the act [at issue] occurred, or was so designated as a result of such act, and … either remains so designated when the claim is filed … or was so designated within the 6-month period before the claim is filed . . . ." *Id*. § 1605A(a)(2)(A)(i). The provision provides a private right of action for U.S. nationals, members of the armed forces, and employees and contractors of the U.S. government to seek damages for personal injury or death resulting from the acts described above. *Id.* § 1605A(c). While the FSIA generally precludes foreign states from liability for punitive damages, 28 U.S.C. § 1606, the terrorism exception specifically permits punitive damages for actions brought under 1605A(c).

On May 21, 2019, the United States filed a brief in the U.S. Supreme Court recommending that the Court grant certiorari on a question presented in *Opati v. Sudan*, No. 17-1268, a case involving the terrorism exception. In addition to the brief filed in *Opati v. Sudan*, the United States filed two related briefs on the same day. The United States recommended that the Court deny certiorari on a cross-petition in *Sudan v. Opati*, 17-1406, and a related petition in *Sudan v. Owens*, 17-1236.[*]

Claims in *Opati v. Sudan* relate to the August 7, 1998 bombings by al-Qaeda at the U.S. Embassies in Kenya and Tanzania, for which Sudan was alleged to have provided material support. The U.S. District Court for the District of Columbia issued a default judgment against Sudan and awarded damages, including punitive damages. Sudan sought to vacate the judgment. The U.S. Court of Appeals for the District of Columbia affirmed the district court's judgment as to respondents' liability, but vacated the punitive damages awards on the ground that the terrorism exception does not authorize punitive damages for pre-enactment conduct. The Supreme Court granted certiorari on this question concerning the availability of punitive damages. On September 24, 2019, the United States filed a brief, excerpted below (with record citations and footnotes omitted), arguing that plaintiffs suing foreign state sponsors of terrorism under the terrorism exception may recover punitive damages for pre-enactment conduct.[**]

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* * * *

The court of appeals correctly recognized that the two-step analysis set forth in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), governs the question whether petitioners may obtain punitive damages under the federal cause of action in 28 U.S.C. 1605A(c) for conduct that predated the current version of the statute. The court erred, however, in concluding that the 2008 amendments lack a clear statement of congressional intent to make punitive damages available for pre-enactment conduct.

[*] Editor's note: The Court denied certiorari on these petitions on May 26, 2020.

[**] Editor's note: On May 18, 2020, the Court held in an 8-0 decision that plaintiffs in a federal cause of action under the terrorism exception may seek punitive damages for pre-enactment conduct.

1. a. In Landgraf, this Court explained that "[w]hen a case implicates a federal statute enacted after the events in suit," a two-step inquiry generally applies. 511 U.S. at 280. "[A] court's first task is to determine whether Congress has expressly prescribed the statute's proper [temporal] reach." *Ibid*. If the statute reflects "clear congressional intent" that the new law should apply to pre-enactment conduct, the court should honor Congress's determination that "the benefits of retroactivity outweigh the potential for disruption or unfairness," and "there is no need to resort to judicial default rules." *Id*. at 268, 280.

If, however, the statute "does not evince any clear expression of intent" about its temporal application, the court must proceed to *Landgraf*'s second step. 511 U.S. at 264. There, the court should consider whether "the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted [or] increase a party's liability for past conduct." *Id*. at 280. If the statute would operate retroactively, the court should apply the "traditional presumption * * * that it does not govern" pre-enactment events, *id*. at 272, 280, "owing to the 'absen[ce of] a clear indication from Congress that it intended such a result,'" *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 37-38 (2006) (quoting *INS v. St. Cyr*, 533 U.S. 289, 316 (2001)) (brackets in original). By contrast, if the rule would not have retroactive effect—for example, because it is a "new jurisdictional" or "procedural" rule that "'takes away no substantive right'" or "regulate[s] secondary rather than primary conduct"—then it generally will apply in suits based on pre-enactment conduct. *Landgraf*, 511 U.S. at 274-275 (citation omitted).

Applying that framework, *Landgraf* held that the Civil Rights Act of 1991, 42 U.S.C. 1981a(a), did not authorize courts to award compensatory and punitive damages to a plaintiff for sexual harassment that pre-dated the Act, where "no relief" would have been available before the Act's enactment. 511 U.S. at 283; see id.at 280-285. The Court first determined that a provision directing that the Act "'shall take effect upon enactment,'" combined with "negative inferences drawn from two [different] provisions of quite limited effect," were insufficient to show that Congress intended the new law to apply to an employer's pre-enactment conduct. *Id.* at 257-259 (citation omitted). Next, the Court concluded that awarding damages under the new law would "impose on employers found liable a new disability in respect to past events." *Id.* at 283 (citation and internal quotation marks omitted). The Court accordingly applied the presumption against retroactivity, holding that the new damages provision did not apply to pre-enactment conduct. *Id.* at 280-285.

In *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), this Court considered whether Landgraf applied to an action under the FSIA. *Altmann* was decided before Congress enacted the federal cause of action in Section 1605A(c); at the time, the FSIA did "not create or modify any causes of action." *Id*. at 695 n.15. Instead, the FSIA "'codifie[d], as a matter of federal law, the restrictive theory of sovereign immunity'" that the State Department had previously adopted in the "'Tate Letter,'" and "transfer[red] primary responsibility for immunity determinations from the Executive to the Judicial Branch." *Id*. at 690-691 (quoting *Verlinden B. V. v. Central Bank of Nigeria*, 461 U.S. 480, 487-488 (1983)).

This Court held that *Landgraf*'s "default rule" did not "control" the question whether the FSIA applied to conduct that predated both the Tate Letter in 1952 and the FSIA's enactment in 1976. *Altmann*, 541 U.S. at 692. The Court explained that the FSIA " defie[d] * * * categorization" as either "affect[ing] substantive rights" or "address[ing] only matters of procedure." *Id.* at 694. Although the plaintiff in *Langdraf* would not have been entitled to any relief prior to enactment of the Civil Rights Act of 1991, the Court acknowledged that "in some cases," prior law would have permitted the recovery of backpay. 511 U.S. at 283. As to those

cases, the Court stated that the creation of new damages remedies also would have retroactive effect. *Ibid*. While the statute "merely open[ed] United States courts to plaintiffs with pre-existing claims against foreign states," rather than creating its own cause of action, it also codified "'the standards governing foreign sovereign immunity as an aspect of substantive federal law.'" *Id*. at 695 (quoting *Verlinden*, 461 U.S. at 497). The Court further found that the nature of foreign sovereign immunity was not amenable to the *Landgraf* test. While the "aim" of the presumption against retroactivity "is to avoid unnecessary post hoc changes to legal rules on which parties relied in shaping their primary conduct," "the principal purpose of foreign sovereign immunity has never been to permit foreign states * * * to shape their conduct in reliance on the promise of future immunity from suit in United States courts." *Id*. at 696. Instead, foreign sovereign immunity is "'a gesture of comity'" that "reflects current political realities and relationships." *Ibid*. (citation omitted).

"In this *sui generis* context," the Court declined to apply *Landgraf*, instead asking whether "anything in the FSIA or the circumstances surrounding its enactment suggests" that it "should not apply" to a foreign sovereign's pre-enactment conduct. *Altmann*, 541 U.S.at 696-697. The Court answered that question in the negative. *Id*. at 697-699. The Court explained that the statute's statement that "[c]laims of foreign states to immunity should henceforth be decided" under the FSIA, 28 U.S.C. 1602, along with the statute's "structure" and "purposes," sufficed to demonstrate that Congress "intended courts to resolve all such claims" under the FSIA, "regardless of when the underlying conduct occurred." *Altmann*, 541 U.S. at 698.

b. The court of appeals correctly determined that *Landgraf*, rather than *Altmann*, applies to the federal cause of action in Section 1605A(c). Pet. App. 123a-126a. As this Court has recognized, the creation of a new cause of action is the paradigmatic circumstance implicating the *Landgraf* framework. See, *e.g.*, *Landgraf*, 511 U.S. at 283 (observing that where a statute "can be seen as creating a new cause of action, * * * its impact on parties' rights is especially pronounced"); *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 948 (1997) (concluding that the *Landgraf* analysis applied to a provision that "change[d] the substance of the existing cause of action"). Indeed, *Altmann* itself explained that where a statute "create[s] or modif[ies] a cause of action," it is properly analyzed under *Landgraf*. 541 U.S. at 695 n.15. Because, at the time of *Altmann*, the FSIA did not create or modify any cause of action, it is not determinative that the Court there declined to address *Landgraf*'s applicability to the FSIA on a provision-by-provision basis. See Pet. Br. 36-37.

2. Although the court of appeals correctly held that *Landgraf* applies to the federal cause of action, it erred in concluding that Section 1605A(c) does not clearly authorize punitive damages for pre-enactment conduct. See Pet. App. 125a-128a.

a. As the court of appeals recognized, and respondents have not disputed, the 2008 amendments clearly permit plaintiffs to invoke the express federal cause of action and recover "economic damages, solatium, [and] pain and suffering * * * damages," 28 U.S.C. 1605A(c), for conduct predating the 2008 NDAA. Pet. App. 122a. That is because the amendments direct that certain then-pending " prior actions" under 28 U.S.C. 1605(a)(7)(2006) "shall * * * be given effect as if [they] had originally been filed under section 1605A(c)." NDAA § 1083(c)(2), 122 Stat. 342-343 (capitalization altered). And they allow plaintiffs to file new actions directly "under section 1605A" if those actions are "related" to actions that were "timely commenced" under 28 U.S.C.1605(a)(7) (2006). NDAA § 1083(c)(3), 122 Stat. 343 (capitalization altered). As the court of appeals acknowledged, the actions permitted by the prior- and related-action provisions "necessarily are based upon the sovereign defendant's conduct before enactment of §

1605A." Pet. App. 122a. Those same statutory provisions demonstrate that punitive damages are available under Section 1605A(c) for pre-enactment conduct. Neither Section 1605A(c), nor the prior- and related-action provisions, distinguish among different types of relief. Instead, the prior- and related-action provisions channel certain claims based on prior events through Section 1605A(c) as a whole. Section 1605A(c), in turn, states that "[i]n any such action"—*i.e.*, in any action governed by subsection (c)—"damages may include economic damages, solatium, pain and suffering, and punitive damages." 28 U.S.C. 1605A(c). If there were any doubt, the 2008 amendments further provide that, "in general," "[t]he amendments made by this section" as a whole "shall apply to any claim arising under section 1605A of title 28." NDAA § 1083(c)(1), 122 Stat. 342 (capitalization altered). Thus, once one accepts that the federal cause of action applies to pre-enactment conduct, and that it makes economic, solatium, and pain and suffering damages available for such conduct, there is no textual basis for reaching a different conclusion with respect to punitive damages.

Indeed, the FSIA's provisions governing prior- and related cases resemble a provision in an earlier civil rights bill that Landgraf reasoned would have "unambiguous[ly]" applied to pre-enactment conduct. 511 U.S. at 263. That provision stated that the new damages provision in the bill "shall apply to all proceedings pending on or commenced after" enactment, *id*. at 255 n.8 (quoting S. 2104, 101st Cong., 2d Sess. § 15(a)(4) (1990)), without singling out pending proceedings seeking punitive damages. Here, Congress similarly provided that "[t]he [2008] amendments * * * shall apply to any claim arising under section 1605A"; authorized plaintiffs with qualifying claims "before the courts in any form" to request that "that action, and any judgment in the action * * * , be given effect as if the action had originally been filed under section 1605A(c)"; and authorized plaintiffs to file "under section 1605A" new actions "[r]elated" to existing actions under the prior terrorism exception. NDAA § 1083(c)(1)-(3), 122 Stat. 342-343.

b. The history of the 2008 amendments confirms that Congress and the Executive understood that Section 1605A would authorize punitive damages for pre-enactment conduct. After the fall of Saddam Hussein's regime in Iraq, President George W. Bush vetoed an earlier version of the 2008 amendments that contained language materially identical to the text of Section 1605A. See H.R. 1585, 110th Cong., 1st Sess. § 1083(a) (2007). Iraq was designated as a state sponsor of terrorism until 2004, 69 Fed. Reg. 58,793 (Sept. 24, 2004), and the proposed legislation would have allowed plaintiffs to recover punitive damages from Iraq for conduct of the former regime. See H.R. 1585 § 1083(a)(1) (requiring courts to hear claims under proposed Section 1605A if the foreign state was designated as a state sponsor of terrorism when "the original action or the related action" was filed); 28 U.S.C. 1605A(a)(2)(A)(i)(II)(same). In vetoing the legislation, the President expressed concern that "creating a new Federal cause of action backed by the prospect of punitive damages to support claims that may previously have been foreclosed" would undermine U.S. foreign policy and burden efforts to rebuild Iraq. Memorandum to the House of Representatives Returning Without Approval the "National Defense Authorization Act for Fiscal Year 2008," 43 Weekly Comp. Pres. Doc. 1641 (Dec. 28, 2007). As ultimately enacted, the 2008 NDAA authorized the President to waive the amendments' application to Iraq, NDAA § 1083(d)(1), 122 Stat. 343, and the President did so, 73 Fed. Reg. 6571 (Feb. 5, 2008); see *Republic of Iraq v. Beaty*, 556 U.S. 848, 853-854 (2009). The author of the terrorism-exception amendment believed that this compromise would address the President's concerns regarding Iraq while preserving other plaintiffs' ability to recover for prior acts of terrorism. See 154 Cong. Rec. at 501 (Sen. Lautenberg) ("By insisting on being

given the power to waive application of this new law to Iraq, the President seeks to prevent victims of past Iraqi terrorism—for acts committed by Saddam Hussein—from achieving the same justice as victims of other countries. Fortunately, the President will not have authority to waive the provision's application to terrorist acts committed by Iran and Libya, among others.").

c. Historical context also indicates that Congress intended to make punitive damages available for conduct predating the 2008 NDAA. The prior Section 1605(a)(7) applied to conduct predating its enactment in April 1996, see AEDPA § 221(c), 110 Stat. 1243, and the broader statutory framework prior to the 2008 amendments makes clear that Congress was aware that courts had awarded punitive damages against foreign states for pre-enactment conduct under that provision. In 2000, Congress directed the Secretary of Treasury to pay to certain plaintiffs with judgments under the terrorism exception 110% of their compensatory damages awards, if they relinquished their rights to punitive damages (or 100% of their compensatory damages awards, if they agreed not to seek to attach certain foreign state assets). Aimee's Law, Pub. L. No. 106-386, Div. C, § 2002(a)(1)-(2), 114 Stat. 1541-1542. At least three of the covered judgments included punitive damages awards against foreign states as such for conduct committed before Section 1605(a)(7)'s enactment in 1996—apparently under the Flatow Amendment, see p. 23 n.5, *infra*—even though Section 1606 barred punitive damages against foreign states at the time. See *Jenco v. Islamic Republic of Iran*, 154 F. Supp. 2d 27, 40 (D.D.C. 2001); *Eisenfeld v. The Islamic Republic of Iran*, 172 F. Supp. 2d 1, 9 (D.D.C. 2000); *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 27 (D.D.C. 1998).

3. The court of appeals' contrary decision, and respondents' defense of it, are unconvincing.

a. Respondents first contend (Br. in Opp. 24-25; Supp. Br. 4) that Section 1605A(c) does not authorize punitive damages for pre-enactment conduct because it uses "plainly equivocal language—'damages may include … punitive damages.'" Supp. Br. 4 (quoting 28 U.S.C. 1605A(c)). But the word "may" simply confirms that a court has discretion in determining damages awards. …

b. Like the court of appeals, see Pet. App. 128a, respondents would require a clearer statement that punitive damages are available for pre-enactment conduct than for other forms of relief. But respondents offer no sound basis for adopting an extra-clear-statement rule.

i. *Landgraf* does not impose a higher bar for giving punitive damages retroactive effect. As discussed above, there, this Court considered whether a provision permitting plaintiffs to recover "compensatory and punitive damages" should apply to cases involving pre-enactment conduct. 511 U.S. at 249. Although the Court acknowledged particular concerns associated with punitive damages, *id.* at 281, it did not establish a higher standard for evaluating Congress's intent with respect to their retroactive application. Instead, the Court considered whether the statute at issue "explicitly authorized punitive damages" for pre-enactment conduct, *ibid.*, just as it determined that the compensatory damages remedy would "not apply" to such conduct "in the absence of clear congressional intent," *id.* at 283. The Court concluded that it "found no clear evidence of congressional intent that [the section]" as a whole "should apply to cases arising before its enactment." *Id.* at 286. The cases that respondents have cited (Br. in Opp. 22) to suggest that Section 1605A(c) lacks the requisite clear statement confirm that no heightened standard applies to punitive damages. In *Ditullio v. Boehm*, 662 F.3d 1091 (2011), the Ninth Circuit considered whether the cause of action in the Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, Div. A, 114 Stat. 1466 (22 U.S.C. 7101 et seq.); see 18 U.S.C. 1595 (2012 & Supp. V 2017), which the court held provided for both compensatory and punitive damages,

applied to pre-enactment conduct. 662 F.3d at 1096-1098. In considering retroactivity, the court found no clear statement with respect to the cause of action as a whole; it did not separately assess the authorization of punitive damages, or hold it to a higher standard. *Id.* at 1098-1102. The same was true in *Gross v. Weber*, 186 F.3d 1089, 1091-1092 (8th Cir. 1999), where the court held that neither the Violence Against Women Act of 2000 (VAWA), Pub. L. No. 106-386, Div. B, 114 Stat. 1491, nor Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 373 (20 U.S.C. 1681), applied to pre-enactment conduct. …

ii. Contrary to respondents' suggestion (Supp. Br. 5), the state of the law before 2008 also did not require Congress to specifically "discuss the damages available for § 1605A(c) claims" in the prior- and related-action provisions. As respondents observe (*ibid.*), before the 2008 NDAA, Section 1606 prohibited United States courts from awarding punitive damages against foreign states, though they could award other forms of damages under state and foreign causes of action. But Congress clearly intended to change that default rule when it created a federal cause of action for which "damages may include economic damages, solatium, pain and suffering, and punitive damages," 28 U.S.C. 1605A(c), as well as highly reticulated prior- and related-action provisions that permitted plaintiffs to rely on Section 1605A(c) with respect to certain pre-enactment conduct.

c. Finally, respondents contend (Supp. Br. 6) that the prior- and related-action provisions "focus" not on making punitive damages available for pre-enactment conduct, but instead on overturning the D.C. Circuit's holding in *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024 (2004), that the FSIA included no federal cause of against foreign state sponsors of terrorism. But Congress's solicitude for plaintiffs disadvantaged by *Cicippio-Puleo* does not show that it intended to limit the remedies available to such plaintiffs. Had Congress intended only to reverse Cicippio-Puleo, it could have made a federal cause of action available against designated state sponsors of terrorism without providing for punitive damages. Instead, Congress created a federal cause of action that expressly authorizes the award of punitive damages; made Section 1606's prohibition on the award of such damages against foreign states inapplicable to both the cause of action and the terrorism exception to immunity more generally, see pp. 28-30, *infra*; directed courts to treat certain already-decided claims "as if [they] had originally been filed under section 1605A(c)"; permitted plaintiffs to file new, "[r]elated" claims "under section 1605A"; and stated that "[t]he amendments made by this section" as a whole "shall apply to any claim arising under section 1605A." NDAA § 1083(c)(1)-(3), 122 Stat. 342-343. The plain text of those provisions makes clear that Congress intended for punitive damages to be available to plaintiffs injured by pre-enactment conduct.

* * * *

5. Service of Process: *Sudan v. Harrison*

As discussed in *Digest 2015* at 386-89, *Digest 2016* at 420, *Digest 2017* at 419-20, and *Digest 2018* at 391-98, the United States consistently argued, from the district court to the Supreme Court, that service on a foreign sovereign through delivery of a summons and complaint to the foreign minister, via its embassy in the United States, does not fulfill the requirements of the FSIA. *Sudan v. Harrison*, No. 16-1094. The Supreme Court issued its decision on March 26, 2019, holding that section 1608(a)(3) of the FSIA requires civil service of process by mail to the foreign minister to be completed by mail

directly to the foreign minister's office in the foreign state. *Republic of Sudan v. Harrison*, 139 S. Ct. 1048 (2019). Excerpts follow from the Court's opinion.

* * * *

The question before us concerns the meaning of §1608(a)(3), and in interpreting that provision, "[w]e begin 'where all such inquiries must begin: with the language of the statute itself.' " *Caraco Pharmaceutical Laboratories, Ltd.* v. *Novo Nordisk A/S*, 566 U. S. 399, 412 (2012) (quoting *United States* v. *Ron Pair Enterprises, Inc.*, 489 U. S. 235, 241 (1989)). As noted, §1608(a)(3) requires that service be sent "by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned." The most natural reading of this language is that service must be mailed directly to the foreign minister's office in the foreign state. Although this is not, we grant, the only plausible reading of the statutory text, it is the most natural one. See, *e.g., United States* v. *Hohri*, 482 U. S. 64, 69–71 (1987) (choosing the "more natural" reading of a statute); *ICC* v. *Texas*, 479 U. S. 450, 456–457 (1987) (same); see also *Florida Dept. of Revenue* v. *Piccadilly Cafeterias, Inc.*, 554 U. S. 33, 41 (2008) (similar).

A key term in §1608(a)(3) is the past participle "addressed." A letter or package is "addressed" to an intended recipient when his or her name and "address" is placed on the outside of the item to be sent. And the noun "address," in the sense relevant here, means "the designation of a place (as a residence or place of business) where a person or organization may be found or communicated with." Webster's Third New International Dictionary 25 (1971) …

We acknowledge that there are circumstances in which a mailing may be "addressed" to the intended recipient at a place other than the individual's residence or usual place of business. … But in the great majority of cases, addressing a mailing to X means placing on the outside of the mailing both X's name and the address of X's residence or customary place of work.

Section 1608(a)(3)'s use of the term "dispatched" points in the same direction. To "dispatch" a communication means "to send [it] off or away (as to a special destination) with promptness or speed often as a matter of official business." Webster's Third 653… . A person who wishes to "dispatch" a letter to X will generally send it directly to X at a place where X is customarily found. The sender will not "dispatch" the letter in a roundabout way, such as by directing it to a third party who, it is hoped, will then send it on to the intended recipient.

A few examples illustrate this point. Suppose that a person is instructed to "address" a letter to the Attorney General of the United States and "dispatch" the letter (*i.e.*, to "send [it] off post-haste") to the Attorney General. The person giving these instructions would likely be disappointed and probably annoyed to learn that the letter had been sent to, let us say, the office of the United States Attorney for the District of Idaho. And this would be so even though a U.S. Attorney's office is part of the Department headed by the Attorney General and even though such an office would very probably forward the letter to the Attorney General's office in Washington. …

A similar understanding underlies the venerable "mail-box rule." As first-year law students learn in their course on contracts, there is a presumption that a mailed acceptance of an offer is deemed operative when "dispatched" if it is "properly addressed." Restatement (Second) of Contracts § 66, p. 161 (1979) (Restatement); *Rosenthal* v. *Walker*, 111 U. S. 185, 193 (1884).

But no acceptance would be deemed properly addressed and dispatched if it lacked, and thus was not sent to, the offeror's address (or an address that the offeror held out as the place for receipt of an acceptance). See Restatement § 66, Comment *b*.

It is also significant that service under §1608(a)(3) requires a signed returned receipt, a standard method for ensuring delivery to the addressee. Cf. Black's Law Dictionary 1096 (10th ed. 2014) (defining "certified mail" as "[m]ail for which the sender requests proof of delivery in the form of a receipt signed by the addressee"). We assume that certified mail sent to a foreign minister will generally be signed for by a subordinate, but the person who signs for the minister's certified mail in the foreign ministry itself presumably has authority to receive mail on the minister's behalf and has been instructed on how that mail is to be handled. The same is much less likely to be true for an employee in the mailroom of an embassy.

For all these reasons, we think that the most natural reading of §1608(a)(3) is that the service packet must bear the foreign minister's name and customary address and that it be sent to the minister in a direct and expeditious way. And the minister's customary office is the place where he or she generally works, not a farflung outpost that the minister may at most occasionally visit.

Several related provisions in §1608 support this reading. …

One such provision is §1608(b)(3)(B). Section 1608(b) governs service on "an agency or instrumentality of a foreign state." And like §1608(a)(3), §1608(b)(3)(B) requires delivery of a service packet to the intended recipient "by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court." But §1608(b)(3)(B), unlike §1608(a)(3), contains prefatory language saying that service by this method is permissible "if reasonably calculated to give actual notice."

Respondents read §1608(a)(3) as embodying a similar requirement. …

This argument runs up against two well-settled principles of statutory interpretation. First, "Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another." *Department of Homeland Security* v. *MacLean*, 574 U. S. ___, ___ (2015) (slip op., at 7). Because Congress included the "reasonably calculated to give actual notice" language only in §1608(b), and not in §1608(a), we resist the suggestion to read that language into §1608(a). Second, "we are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law." *Mackey* v. *Lanier Collection Agency & Service, Inc.*, 486 U. S. 825, 837 (1988). Here, respondents encounter a superfluity problem when they argue that the "addressed and dispatched" clause in §1608(a)(3) gives effect to the *Mullane* due process standard. They fail to account for the fact that §1608(b)(3)(B) contains *both* the "addressed and dispatched" and "reasonably calculated to give actual notice" requirements. If respondents were correct that "addressed and dispatched" means "reasonably calculated to give notice," then the phrase "reasonably calculated to give actual notice" in §1608(b)(3) would be superfluous. Thus, as the dissent agrees, §1608(a)(3) "does not deem a foreign state properly served solely because the service method is reasonably calculated to provide actual notice." *Post,* at 2 (opinion of THOMAS, J.).

Section 1608(b)(2) similarly supports our interpretation of §1608(a)(3). Section 1608(b)(2) provides for delivery of a service packet to an officer or a managing or general agent of the agency or instrumentality of a foreign state or "to any other agent authorized by appointment or by law to receive service of process in the United States."

This language is significant for three reasons. First, it expressly allows service on an agent. Second, it specifies the particular individuals who are permitted to be served as agents of

the recipient. Third, it makes clear that service on the agent may occur *in the United States* if an agent here falls within the provision's terms. If Congress had contemplated anything similar under §1608(a)(3), there is no apparent reason why it would not have included in that provision terms similar to those in §1608(b)(2). Respondents would have us believe that Congress was content to have the courts read such terms into §1608(a)(3). In view of §1608(b)(2), this seems unlikely. …

Section 1608(c) further buttresses our reading of §1608(a)(3). Section 1608(c) sets out the rules for determining when service "shall be deemed to have been made." For the first three methods of service under §1608(a), service is deemed to have occurred on the date indicated on "the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed." §1608(c)(2). The sole exception is service under §1608(a)(4), which requires the Secretary of State to transmit a service packet to the foreign state through diplomatic channels. Under this method, once the Secretary has transmitted the packet, the Secretary must send to the clerk of the court "a certified copy of the diplomatic note indicating when the papers were transmitted." §1608(a)(4). And when service is effected in this way, service is regarded as having occurred on the transmittal date shown on the certified copy of the diplomatic note. §1608(c)(1).

Under all these methods, service is deemed to have occurred only when there is a strong basis for concluding that the service packet will very shortly thereafter come into the hands of a foreign official who will know what needs to be done. Under §1608(a)(4), where service is transmitted by the Secretary of State through diplomatic channels, there is presumably good reason to believe that the service packet will quickly come to the attention of a high-level foreign official, and thus service is regarded as having been completed on the date of transmittal. And under §§1608(a)(1), (2), and (3), where service is deemed to have occurred on the date shown on a document signed by the person who received it from the carrier, Congress presumably thought that the individuals who signed for the service packet could be trusted to ensure that the service packet is handled properly and expeditiously.

It is easy to see why Congress could take that view with respect to a person designated for the receipt of process in a "special arrangement for service between the plaintiff and the foreign state or political subdivision," §1608(a)(1), and a person so designated under "an applicable international convention," §1608(a)(2). But what about §1608(a)(3), the provision now before us? Who is more comparable to those who sign for mail under §§1608(a)(1) and (2)? A person who works in the office of the foreign minister in the minister's home country and is authorized to receive and process the minister's mail? Or a mailroom employee in a foreign embassy? We think the answer is obvious, and therefore interpreting §1608(a)(3) to require that a service packet be sent to a foreign minister's own office better harmonizes the rules for determining when service is deemed to have been made.

Respondents seek to soften the blow of an untimely delivery to the minister by noting that the foreign state can try to vacate a default judgment under Federal Rule of Civil Procedure 55(c). Brief for Respondents 27. But that is a poor substitute for sure and timely receipt of service, since a foreign state would have to show "good cause" to vacate the judgment under that Rule. Here, as with the previously mentioned provisions in §1608, giving §1608(a)(3) its ordinary meaning better harmonizes the various provisions in §1608 and avoids the oddities that respondents' interpretation would create.

The ordinary meaning of the "addressed and dispatched" requirement in §1608(a)(3) also has the virtue of avoiding potential tension with the Federal Rules of Civil Procedure and the Vienna Convention on Diplomatic Relations.

Take the Federal Rules of Civil Procedure first. At the time of the FSIA's enactment, Rule 4(i), entitled "Alternative provisions for service in a foreign-country," set out certain permissible methods of service on "part[ies] in a foreign country." Fed. Rule Civ. Proc. 4(i)(1) (1976). One such method was "by any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court *to the party to be served*." Rule 4(i)(1)(D) (emphasis added). Rule 4(i)(2) further provided that "proof of service" pursuant to that method "shall include a receipt *signed by the addressee* or other evidence of *delivery to the addressee* satisfactory to the court." (Emphasis added.) The current version of Rule 4 is similar. See Rules 4(f)(2)(C)(ii), 4(*l*)(2)(B).

The virtually identical methods of service outlined in Rule 4 and §1608(a)(3) pose a problem for respondents' position: If mailing a service packet to a foreign state's embassy in the United States were sufficient for purposes of §1608(a)(3), then it would appear to be easier to serve the foreign state than to serve a person in that foreign state. This is so because a receipt signed by an embassy employee would not necessarily satisfy Rule 4 since such a receipt would not bear the signature of the foreign minister and might not constitute evidence that is sufficient to show that the service packet had actually been delivered to the minister. It would be an odd state of affairs for a foreign state's inhabitants to enjoy more protections in federal courts than the foreign state itself, particularly given that the foreign state's immunity from suit is at stake. The natural reading of §1608(a)(3) avoids that oddity.

Our interpretation of §1608(a)(3) avoids concerns regarding the United States' obligations under the Vienna Convention on Diplomatic Relations. We have previously noted that the State Department "helped to draft the FSIA's language," and we therefore pay "special attention" to the Department's views on sovereign immunity. *Bolivarian Republic of Venezuela* v. *Helmerich & Payne Int'l Drilling Co.*, 581 U. S. ___, ___ (2017) (slip op., at 9). It is also "well settled that the Executive Branch's interpretation of a treaty 'is entitled to great weight.'" *Abbott* v. *Abbott*, 560 U. S. 1, 15 (2010) (quoting *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U. S. 176, 185 (1982)).

Article 22(1) of the Vienna Convention provides: "The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission." Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U. S. T. 3237, T. I. A. S. No. 7502. Since at least 1974, the State Department has taken the position that Article 22(1)'s principle of inviolability precludes serving a foreign state by mailing process to the foreign state's embassy in the United States. See Service of Legal Process by Mail on Foreign Governments in the United States, 71 Dept. State Bull. 458–459 (1974). In this case, the State Department has reiterated this view in *amicus curiae* briefs filed in this Court and in the Second Circuit. The Government also informs us that United States embassies do not accept service of process when the United States is sued in a foreign court, and the Government expresses concern that accepting respondents' interpretation of §1608 might imperil this practice. Brief for United States as *Amicus Curiae* 25–26.

Contending that the State Department held a different view of Article 22(1) before 1974, respondents argue that the Department's interpretation of the Vienna Convention is wrong, but we need not decide this question. By giving §1608(a)(3) its most natural reading, we avoid the potential international implications of a contrary interpretation.

* * * *

6. Execution of Judgments against Foreign States and Other Post-Judgment Actions

a. Bank Markazi v. Peterson

On December 9, 2019, the United States filed an amicus brief recommending the Supreme Court deny certiorari in two cases consolidated for review, *Clearstream Banking v. Peterson*, No. 17-1529, and *Bank Markazi v. Peterson*, No. 17-1534. The U.S. brief does not support the underlying Second Circuit decision concerning execution of a foreign state's assets located outside of the United States. However, the brief argues that the court of appeals had identified several issues to be resolved upon remand to the district court, making Supreme Court review inappropriate at the time. Excerpts follow from the U.S. brief.

_____

* * * *

In this case, the court of appeals concluded that a foreign sovereign's property outside the United States is subject to attachment and execution in U.S. courts. That conclusion likely would warrant this Court's review in an appropriate case at an appropriate time. In the decision below, however, the court of appeals identified several jurisdictional and other issues for the district court to address on remand, including whether principles of international comity would independently foreclose the turnover order sought by respondents. … The resolution of those other issues may bear on the practical significance of the decision below and the need for this Court's review in this particular case. In addition, both Houses of Congress have passed separate bills that, if either becomes law, could substantially affect the proper disposition of this case. Accordingly, the Court should deny the petitions for writs of certiorari at this time.

A. The Court Of Appeals' Interlocutory Decision Is Flawed

1. Before the FSIA, foreign sovereign property had absolute immunity from attachment or execution in U.S. courts. …

When it enacted the FSIA, Congress only "partially lower[ed] the barrier of immunity from execution," House Report 27, by providing for carefully limited exceptions to execution immunity for property *in* the United States. Section 1609 prescribes a general rule of immunity from execution for "the property in the United States of a foreign state." 28 U.S.C. 1609. Section 1610, in turn, provides exceptions to execution immunity for "[t]he property in the United States of a foreign state * * * used for a commercial activity in the United States," and "any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States," subject to the additional limitations imposed by Section 1611. 28 U.S.C. 1610(a) and (b).

Those exceptions to execution immunity "are narrower than the exceptions to jurisdictional immunity." *Rubin* v. *Islamic Republic of Iran*, 637 F.3d 783, 796 (7th Cir. 2011), cert. denied, 567 U.S. 944 (2012). For example, the FSIA abrogates jurisdictional immunity for

suits "based upon a commercial activity carried on in the United States by the foreign state," 28 U.S.C. 1605(a)(2), but the corresponding execution-immunity exception applies only to property that "is or was used for the commercial activity" in the United States, 28 U.S.C. 1610(a)(2). The statute thus contemplates that some judgment creditors will "have to rely on foreign states to voluntarily comply with U.S. court judgments," *Peterson* v. *Islamic Republic of Iran*, 627 F.3d 1117, 1128 (9th Cir. 2010), as was true before the FSIA. The narrower scope of the immunity exceptions reflects a judgment that authorizing execution against a sovereign's property is a greater intrusion on state sovereignty than merely exercising jurisdiction. See *Republic of Philippines* v. *Pimental*, 553 U.S. 851, 866 (2008) (discussing the "specific affront that could result" to a state from seizing its property "by the decree of a foreign court").

Accordingly, every court of appeals to have addressed the issue before the decision below had treated the presence of the disputed foreign sovereign property *in the United States* as a prerequisite to attachment or execution in U.S. courts. See *Rubin* v. *Islamic Republic of Iran*, 830 F.3d 470, 475 (7th Cir. 2016) (identifying as one of the "basic criteria" for attachment that the property "must be within the territorial jurisdiction of the district court"), aff 'd, 138 S. Ct. 816 (2018); *Peterson*, 627 F.3d at 1131-1132 (concluding that foreign-state property located in France is "not 'property in the United States' " and is therefore "immune from execution") (quoting 28 U.S.C. 1610(a)(7)); *Connecticut Bank of Commerce* v. *Republic of Congo*, 309 F.3d 240, 247 (5th Cir. 2002) (stating that U.S. courts "may execute only against property that meets" specified criteria, including that the property be " 'in the United States' ") (quoting 28 U.S.C. 1610(a)(1)).

2. The court of appeals concluded that this Court's decision in *Republic of Argentina* v. *NML Capital, Ltd.*, 573 U.S. 134 (2014), "vitiated" any prior consensus that foreign sovereign property outside the United States is not subject to attachment and execution in U.S. courts. … *NML Capital*, however, presented the "single, narrow question" whether the FSIA limits the scope of post-judgment discovery in aid of execution "when the judgment debtor is a foreign state." 573 U.S. at 140. Argentina had argued that discovery of its assets outside the United States was inappropriate because those assets could not be subject to execution in U.S. courts. … *NML Capital*, *supra* (No. 12-842). This Court concluded that the FSIA does not speak to the scope of discovery and therefore that the usual rules governing discovery apply, rather than a special rule for foreign sovereigns. See *NML Capital*, 573 U.S. at 142.

In finding that the FSIA does not confer immunity from "discovery of information concerning extraterritorial assets," *NML Capital*, 573 U.S. at 145 n.4, the Court did not hold that such assets are subject to execution in U.S. courts. The Court instead appeared to view discovery as a means of uncovering the location of foreign sovereign property abroad in order to determine whether it might be "executable under the relevant jurisdiction's law." *Id.* at 144. That understanding accords with the usual practice for seeking to enforce the judgment of a U.S. court in a foreign jurisdiction. See, *e.g.*, *Autotech Techs. LP* v. *Integral Research & Dev. Corp.*, 499 F.3d 737, 751 (7th Cir. 2007) ("If assets exist in another country, the person seeking to reach them must try to obtain recognition and enforcement of the U.S. judgment in the courts of that country."), cert. denied, 552 U.S. 1231 (2008).

The court of appeals focused on two other passages in *NML Capital*, neither of which compels the result the court reached. … In the first passage, this Court observed that "any sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text. Or it must fall." *NML Capital*, 573 U.S. at 141-142. But that statement was made to explain why the FSIA itself should not be read to confer implicit immunity from discovery, given its

express provisions for jurisdictional and execution immunity. See *id.* at 142-143. The Court has previously recognized, in a case involving official immunity, that "[e]ven if a suit is not governed by the [FSIA], it may still be barred by foreign sovereign immunity under the common law." *Samantar* v. *Yousuf*, 560 U.S. 305, 324 (2010).

In the second passage, the Court observed that, "even if " a foreign state's extraterritorial assets were immune from execution under pre-FSIA law, "then it would be obvious that the terms of [Section] 1609 execution immunity are narrower, since the text of that provision immunizes only foreign-state property '*in the United States*.'" *NML Capital*, 573 U.S. at 144. But that statement was made in response to the argument that "§ 1609 execution immunity implies coextensive discovery-in-aid-of-execution immunity." *Ibid.* The Court reasoned that, because the FSIA itself, in Section 1609, does not establish immunity for foreign sovereign assets abroad, then neither does the FSIA itself confer immunity from discovery about those assets. The Court did not say that the FSIA abrogated whatever immunity from actual execution those assets would have enjoyed prior to enactment of the FSIA, nor that the FSIA forecloses whatever immunity from actual execution those assets now would enjoy independent of the FSIA. In context, moreover, a critical assumption of the Court's reasoning was that U.S. courts "generally lack authority * * * to execute against property in other countries." *Ibid.* No party appears to have raised the possibility that a U.S. court might leverage its exercise of personal jurisdiction over a litigant in the United States to require the litigant to bring foreign sovereign property to the United States for execution. The Court accordingly had no occasion to address that possibility.

3. Other than *NML Capital*, the court of appeals did not identify any basis for its conclusion that U.S. law provides greater immunity when a foreign state's property is located in this country than when the property is located abroad, including in the foreign state's own territory. It is unlikely that Congress, in providing for only limited inroads on execution immunity for certain foreign sovereign property in the United States, see 28 U.S.C. 1609-1611, intended to subject foreign sovereign property *abroad* to the kind of turnover order contemplated here.

B. Further Review Is Not Warranted At This Time

Although the court of appeals' decision is flawed, this Court's review is not warranted at this time for several reasons.

1. a. The court of appeals identified several significant unresolved issues for the district court to address on remand, including threshold jurisdictional questions. …

First, the court of appeals directed the district court to determine whether Clearstream is subject to the district court's personal jurisdiction. …

Second, the court of appeals acknowledged that the FSIA's execution-immunity provisions may apply after foreign sovereign property is brought into the United States. …The court indicated that a "two-step process" should occur on remand, first "recalling the asset at issue" and then "proceeding with a traditional FSIA analysis." … Elsewhere, however, the court appeared to leave open the possibility that the district court can and should address the second step— whether the assets would be entitled to execution immunity in U.S. courts if brought to the United States—before ordering any turnover. See *id.* at 63a (directing the district court to "determine whether any provision of * * * federal law prevents the court from recalling, or the plaintiffs from receiving, the asset[s]").

The two-step process contemplated by the court of appeals creates uncertainty about the import and effect of the decision below. Petitioners argue that, under state law, the property need

not necessarily first be brought to the United States but could instead be transferred directly to the judgment creditor abroad. … If such an order were permissible under state law, the second step contemplated by the decision below would be inapplicable, and the FSIA's carefully crafted provisions for and exceptions to execution immunity would never come into play. And even if such an order were not permissible, ordering a foreign state's property to be transferred from abroad into the United States at step one could affect the legal status of the assets at step two; the decision below leaves unclear how the district court should account for that possibility. …Those issues would need to be resolved by the district court on remand.

Third, the court of appeals invited the district court to consider whether principles of international comity should bar the contemplated turnover order. … This Court has described international comity as "the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states." *Société Nationale Industrielle Aérospatiale* v. *United States Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 543 n.27 (1987). Among other things, principles of comity counsel special caution when there may be a "conflict between domestic and foreign law," such that a litigant faces the prospect of conflicting legal obligations. *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 798 (1993) (citation omitted); cf. *Gucci Am., Inc.* v. *Bank of China*, 768 F.3d 122, 139 (2d Cir. 2010) (stating that a "comity analysis" is "appropriate before ordering a nonparty foreign bank to freeze assets abroad in apparent contravention of foreign law to which it is subject"). Here, Clearstream may face such a prospect because the assets that respondents seek to have turned over are also the subject of litigation in Luxembourg brought by U.S. victims of the 9/11 terrorist attacks and their families, who are also judgment creditors of Iran.

Fourth, the court of appeals directed the district court to consider any potential "state law" barriers to a turnover order under the circumstances, …

b. The question presented would be better addressed, if necessary, after those issues are resolved on remand. …

2. This dispute is also the subject of pending legislation that may bear on the proper disposition of the case. Cf. *Bank Markazi* v. *Peterson*, 136 S. Ct. 1310, 1317 (2016). On June 27, 2019, the Senate passed the National Defense Authorization Act for Fiscal Year 2020, S. 1790, 116th Cong., 1st Sess. (June 27, 2019). See 165 Cong. Rec. S4604 (daily ed. June 27, 2019). Section 6206(b) of that bill would amend 22 U.S.C. 8772—the provision at issue in *Bank Markazi*, see 136 S. Ct. at 1318-1319—to state that, notwithstanding any other provision of law, certain financial assets that would be blocked under U.S. sanctions if they "were located in the United States" shall be subject to "an order directing that the asset[s] be brought to the State in which the court is located * * * without regard to concerns relating to international comity." S. 1790, § 6206(b)(1). The bill would further direct that the financial assets subject to those amendments include the assets that are the subject of this case. S. 1790, § 6206(b)(2)(C). The House of Representatives has passed an identical proposal in a separate bill. See Damon Paul Nelson and Mathew Young Pollard Intelligence Authorization Act for Fiscal Years 2018, 2019, and 2020, H.R. 3494, 116th Cong., 1st Sess., § 721(b) (July 17, 2019).

3. Finally, the decision below implicates important foreign-policy interests of the United States. The court of appeals determined that foreign sovereign property is unprotected by execution immunity in U.S. courts as long as the property is located outside the United States. If, after the resolution of the unresolved procedural and jurisdictional questions described above, the district court were to issue an order restraining foreign sovereign property located abroad, such an order could in turn put U.S. property at risk. "[S]ome foreign states base their sovereign

immunity decisions on reciprocity." *Persinger* v. *Islamic Republic of Iran*, 729 F.3d 835, 841 (D.C. Cir.), cert. denied, 469 U.S. 881 (1984). In view of the full range of U.S. foreign-policy interests, the considered view of the United States is that this Court's review is, nevertheless, not warranted at this time.

* * * *

As referenced in the December 9 brief excerpted above, Congress was considering legislation in 2019 that would bear on the issue in the *Peterson* cases. On December 20, 2019, subsequent to the enactment of the relevant law (Section 1226 of the National Defense Authorization Act for Fiscal Year 2020 ("2020 NDAA"), Pub. L. No. 116-92), the United States filed a supplemental amicus brief, recommending that the Court grant the petitions, vacate the decision, and remand for further proceedings in light of the 2020 NDAA. Section 1226 of the NDAA amends Section 502 of the Iran Threat Reduction and Syria Human Rights Act of 2012 such that, "notwithstanding any other provision of law, including any provision of law relating to sovereign immunity, and preempting any inconsistent provision of State law," a specified "financial asset" that meets certain criteria "shall be subject to execution or attachment in aid of execution, or to an order directing that the asset be brought to the State in which the court is located and subsequently to execution or attachment in aid of execution, * * * without regard to concerns relating to international comity," in order to satisfy a terrorism-related judgment for compensatory damages against Iran. The amended statute specifies that the assets at issue in the *Peterson* cases are within the scope of this provision.[*]

b. Chabad v. Russia

For background on *Chabad v.* Russia, No. 05-cv-01548 (D.D.C.) and discussion of previous U.S. statements of interest in the case, see *Digest 2016* at 439-49; *Digest 2015* at 419; *Digest 2014* at 410-13; *Digest 2012* at 319-23; and *Digest 2011* at 445-47. The case concerns Chabad's efforts to secure the transfer of certain books and manuscripts ("the Collection") from the Russian Federation. The Collection consists of materials that were seized at the time of the Bolshevik Revolution and are now held by the Russian State Library, and materials seized by Nazi Germany and later taken by Soviet forces and now held at the Russian State Military Archive. In 2010, the district court entered a default judgment in Chabad's favor directing transfer of the Collection. In 2013, the court imposed monetary contempt sanctions for Russia's failure to make the transfer.

On November 26, 2019, the United States filed a supplemental statement of interest in the district court clarifying that the United States had not changed its position with respect to enforcement of civil contempt sanctions imposed upon Russia and

[*] Editor's note: On January 13, 2020, the Supreme Court granted the petition, vacated the judgment, and remanded the case for further consideration in light of the National Defense Authorization Act for Fiscal Year 2020, as recommended in the December 20, 2019 supplemental brief.

related discovery. On December 20, 2019, the district court issued a number of orders pertaining to the case, including an order denying a motion to quash a subpoena issued to Tenex-USA. Excerpts follow (with record citations and footnotes omitted) from the 2019 U.S. statement of interest. The full text is available at https://www.state.gov/digest-of-united-states-practice-in-international-law/.

* * * *

Since the United States filed its last Statement of Interest in this case, Plaintiff has asserted in several filings that the United States no longer opposes contempt sanctions or Plaintiff's discovery efforts. This assertion is incorrect.

First, Plaintiff argues that the United States has changed its position because it has not (until now) filed a Statement of Interest addressing Plaintiff's Motion for Additional Interim Judgment of Accrued Sanctions, and Motion for Increased Sanctions. Of course, as a nonparty, the United States is under no obligation to file a response to motions in this matter. Rather, the United States has discretion under 28 U.S.C. § 517 "to attend to the interests of the United States in a suit pending in a court of the United States." Although the United States carefully considered the Court's request to "update" the Statements of Interest, the United States did not file a response to Plaintiff's Motion for Additional Interim Judgment of Accrued Sanctions and Motion for Increased Sanctions because there were no material developments to bring to the Court's attention. There is, accordingly, nothing to infer from the United States' decision not to file a response.

Second, Plaintiff argues that the United States has changed its position because it argued in another matter before the Supreme Court that a district court could impose monetary contempt sanctions against a foreign state owned enterprise that failed to comply with a federal grand jury subpoena. This assertion is incorrect, however. In that matter, *In re Grand Jury Subpoena*, No. 18-948 (U.S.), the United States argued that the FSIA does not apply in criminal cases, including when a court issues contempt sanctions in a criminal case. *See Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983) (observing that the FSIA "contains a comprehensive set of legal standards governing claims of immunity in every *civil* action against a foreign state or its political subdivisions, agencies or instrumentalities" (emphasis added)). Accordingly, the United States argued that the Supreme Court should not review the Court of Appeals' judgment to permit monetary contempt sanctions against a foreign state owned enterprise that failed to comply with a federal grand jury subpoena. At the same time, the United States made clear that its position was consistent with its opposition in civil cases to the "imposition of contempt sanctions for failure to comply with a discovery or injunctive order in part *because the sanctions would be unenforceable under the FSIA*." (emphasis added). The United States pointed to the FSIA's limitation to civil proceedings and general principles of equity and comity: although "principles of equity and comity" guard "against the imposition of unenforceable contempt sanctions in civil litigation brought by a private party against a foreign state," such principles do not exist when "the government is a party to [the] case and itself sought the contempt sanction in a criminal proceeding against a state-owned commercial enterprise." Further, as this Court has previously noted in this case, there is a distinction between imposition of contempt sanctions and subsequent enforcement of such sanctions. Likewise, as the Government noted in its brief, the

court of appeals in *In re Grand Jury Subpoena* explicitly declined to reach the issue of whether enforcement of contempt sanctions would be permitted. By contrast, the subpoenas at issue before this Court directly pertain to the enforcement of a monetary sanction judgment. Therefore, the United States' position in *In re Grand Jury Subpoena* is entirely consistent with its previous Statements of Interest in this case.

* * * *

B. HEAD OF STATE AND OTHER FOREIGN OFFICIAL IMMUNITY

1. *Miango v. Democratic Republic of the Congo*

On May 1, 2019, at the invitation of the court, the United States filed a statement of interest in *Miango v. Democratic Republic of the Congo*, No. 15-cv-01265 (D.D.C.). The U.S. statement explains relevant principles the State Department applies in foreign official immunity cases, and notes that the court should engage in fact-finding to determine whether the individuals named in the suit are immune under the articulated principles. Excerpts follow (with most footnotes omitted) from the U.S. statement of interest, which is available in full at https://www.state.gov/digest-of-united-states-practice-in-international-law/. The letter from Jennifer Newstead, referred to as Exhibit A in the statement of interest, is excerpted *infra* and also available at https://www.state.gov/digest-of-united-states-practice-in-international-law/.

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* * * *

Plaintiffs allege that on August 6, 2014, they staged a peaceful protest in front of the Capella Hotel, where Joseph Kabila, the President of the Democratic Republic of the Congo, was staying during his visit to Washington, D.C., for the "U.S.-Africa Leaders' Summit." Second Am. Compl. ¶ 24. Plaintiffs' protest was aimed at alleged "human rights abuses and violations" in the Democratic Republic of the Congo. *Id.* ¶ 26. Plaintiffs allege that the individual DRC defendants began "belittling, threatening, intimidating, and disrupting" Plaintiffs' protest. *Id.* ¶ 28. Plaintiffs further allege that their protest remained peaceful and continued as President Kabila approached and entered the Capella Hotel. *Id.* ¶ 29, 31. Shortly after President Kabila entered the hotel, Plaintiffs allege that a group of "apparent security enforcers" "rushed out" of the hotel to join the individual DRC defendants and "physically attack[ed]" Plaintiff Jacques Dieudonne Itonga Miango and a "student protester." *Id.* ¶ 32. Plaintiff Miango was allegedly "knocked down to the ground, beaten, kicked, choked, and stomped on by … Kabila's security enforcers … including Defendant Kassamba and Defendant Sam Mpengo Mbey." *Id.* After the attack, Plaintiffs allege that "some of" the individual DRC defendants (unidentified by name) raided Plaintiff Miango's car and confiscated his possessions, including "protest materials, a computer, [an] iPod, a camera, and other items." *Id.* ¶ 34.

Plaintiffs brought suit against a variety of defendants under the Alien Tort Statute, 28 U.S.C. § 1350, the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. § 1330 *et seq.*,

the Federal Tort Claims Act, 28 U.S.C. § 1346 *et seq.*, and the statutory and common law of the District of Columbia. *Id.* ¶ 1, 39–156, 173–82. …

* * * *

ARGUMENT

The Department of State has determined that the Diplomatic Relations Act does not provide diplomatic immunity to the individual DRC defendants. *See* Letter from Jennifer G. Newstead to Joseph H. Hunt at 1 (copy attached as Exhibit A). The State Department also has considered whether the individual DRC defendants are immune from suit based on claims concerning acts taken in an official capacity (i.e., conduct-based immunity), under the principles accepted by the Executive Branch. *See id.*…The State Department does not have sufficient factual information at this time concerning the involvement of the individual DRC defendants in this attack to determine whether the individual DRC defendants would enjoy conduct-based immunity. *See* Exh. A at 1–3. Because the State Department lacks sufficient factual information in this case to make an immunity determination at this time, the State Department respectfully requests that the Court undertake limited fact-finding about the nature of the attack and, in particular, the involvement of the individual DRC defendants. *Id.* at 3. After the Court makes its factual findings, if the Court does not find facts that align with the guidance provided below by the State Department, it would be appropriate for the Court to invite the State Department's views concerning the application of the immunity principles recognized by the Executive Branch to the facts found by the Court. *See id.*

I. The Individual DRC Defendants Are Not Immune From This Suit Under The Diplomatic Relations Act.

The individual DRC defendants argue that they enjoy diplomatic immunity because they were members of a "diplomatic mission" to the United States under the Diplomatic Relations Act of 1978, Pub. L. No. 95-393, 92 Stat. 808 (22 U.S.C. § 254a *et seq.*) (DRA). … But, for the reasons set forth below, the State Department has concluded that the Diplomatic Relations Act does not provide diplomatic immunity to the individual DRC defendants.

The DRA gives effect to the Vienna Convention on Diplomatic Relations, 23 U.S.T. 3227, 500 U.N.T.S. 95 (VCDR), which entered into force for the United States in 1972. The DRA provides that "[a]ny action or proceeding brought against an individual who is entitled to immunity with respect to such action or proceeding under the [VCDR] … or under any other laws extending diplomatic privileges and immunities, shall be dismissed." 22 U.S.C. § 254d. "[T]he purpose of such immunit[y] is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States." VCDR, preamble, clause 4. Although the VCDR does not expressly define the term "mission," the DRA defines the term "mission" as including "missions within the meaning of the [VCDR] and any missions representing foreign governments, individually or collectively, which are extended the same privileges and immunities, pursuant to law, as are enjoyed by missions under the Vienna Convention." 22 U.S.C. § 254a(3). Applying this definition, the United States has long interpreted the DRA to apply to diplomats assigned to missions in the United States, and has never interpreted it to apply to visiting foreign officials who are no longer in the United States. *See, e.g., United States v. Sissoko*, 995 F. Supp. 1469, 1470 (S.D. Fla. 1997) …

The State Department determines who is entitled to diplomatic immunity. *See Gonzalez Paredes v. Vila*, 479 F. Supp. 2d 187, 192 (D.D.C. 2007) …. The State Department's Office of

Foreign Missions conducted a records check and reported that none of the individual DRC defendants had been notified to the State Department as members of the DRC's diplomatic mission in the United States. Exh. A at 1. Because the individual DRC defendants are not members of a diplomatic mission as those terms are understood under the DRA and the VCDR, they do not benefit from diplomatic immunity.

To support their argument that they are immune from suit, the individual DRC defendants point to internal State Department communications (released pursuant to a Freedom of Information Act request) in which the State Department assessed that the members of President Kabila's traveling party involved in the attack enjoyed "diplomatic immunity." … But that assessment was focused on a different inquiry not governed by the DRA and VCDR: whether the individual DRC defendants were immune from suit *while in the United States as part of the DRC head of state's traveling party*. Once the head of state's visit concluded, immunity associated with that visit ceased.

In sum, the State Department has concluded that Diplomatic Relations Act does not provide diplomatic immunity to the individual DRC defendants.

II. Additional Factual Development Is Necessary To Determine Whether The Individual DRC Defendants Are Immune From Suit Under Principles Of Conduct-Based Immunity Accepted By The Executive Branch.

After concluding that the individual DRC defendants are not immune from suit under the Diplomatic Relations Act, the State Department considered whether the individual DRC defendants are entitled to conduct-based immunity for official acts. For the foregoing reasons, it is the State Department's position that the factual record is insufficient for the State Department to determine at this time whether the individual DRC defendants were involved in the incident underlying the Second Amended Complaint and thus whether or not they are immune from suit.

The Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1330, 1602 *et seq.*, governs the immunity of foreign states from civil suit in courts in the United States. Before Congress enacted the FSIA, foreign state immunity was determined by a "two-step procedure." *Samantar v. Yousuf*, 560 U.S. 305, 311 (2010). If the State Department suggested the immunity of a foreign state, the court dismissed the suit. *Id.* If the State Department did not provide its views, "a district court had authority to decide for itself whether all the requisites for such immunity existed" applying "the established policy of the [State Department]." *Id.* at 312 (quotation marks omitted; alteration in original). In *Samantar*, the Supreme Court held that the FSIA codified principles of foreign state immunity and so supplanted the Executive Branch's determination of the governing principles. *Id.* at 325. But the Court found "nothing in the [FSIA's] origin or aims to indicate that Congress similarly wanted to codify the law of foreign official immunity." *Id.*; *see id.* at 323 … Accordingly, the two-step procedure continues to apply in suits against foreign officials, and the principles accepted by Executive Branch govern. *See Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945)…[6]

[6] In a recent case in which a defendant claimed foreign official immunity and in which the State Department did not participate, the D.C. Circuit evaluated the foreign official's immunity by applying principles identified by the Restatement (Second) of Foreign Relations Law. *See Lewis v. Mutond*, 918 F.3d 142, 145 (D.C. Cir. 2019). The Court relied on the Restatement because both parties "assume[d]" that the Restatement "captures the contours of common-law official immunity." *Id.* at 146. But the Court "proceed[ed] on that understanding without deciding the issue." *Id.* As explained above, in suits in which the State Department does not participate, courts are to apply the immunity principles accepted by the Executive Branch. And if those principles are not discernable, the proper course is for the court to invite the United States' views, as the Court did in this case.

As a general matter, under principles of customary international law accepted by the Executive Branch, a foreign official enjoys immunity from suit based upon acts taken in an official capacity. The State Department does not have sufficient factual information at this time concerning the individual DRC defendants' involvement in the attack. *See* Exh. A at 1–3. The resolution of th[ese] factual questions is necessary to determine whether the individual DRC defendants enjoy immunity from suit under the conduct-based immunity principles accepted by the Executive Branch.

Foreign official immunity, like foreign state immunity, is a threshold question. In the context of foreign state immunity, the Supreme Court has explained that when the question of immunity "turn[s] upon further factual development, the trial judge may take evidence and resolve relevant factual disputes." *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1316 (2017). The Court further explained that immunity determinations must be made as early in the litigation as possible. *See id.* at 1317 (citing *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493–94 (1983)). Therefore, if there are factual questions that need to be resolved to make the foreign state immunity determination, the Court must undertake the needed factual inquiry as early in the litigation as possible. The same principle applies to factual questions controlling a foreign official's immunity from suit under the principles accepted by the Executive Branch.

Accordingly, the United States respectfully requests that the Court undertake limited fact-finding about the nature of the attack and, in particular, the involvement of the individual DRC defendants. As a general matter, if the Court finds that Plaintiffs' allegations could be substantiated against the individual DRC defendants named in the Second Amended Complaint, and concludes that this attack was an entirely unprovoked attack on peaceful protesters exercising their First Amendment rights, it would not constitute an official act for which conduct-based immunity would be available. Exh. A at 2–3. On the other hand, if the Court finds that the individual DRC defendants are named in this action due to their official positions, and that they were not responsible for an entirely unprovoked attack against peaceful protesters exercising their First Amendment rights, the State Department would recognize their immunity from this suit. *Id.* at 3. After the Court makes its findings of fact, if the Court does not find facts that align with the guidance provided above by the State Department, it would be appropriate for the Court to invite the State Department's views concerning the application of the immunity principles recognized by the Executive Branch to the facts found by the Court. *See id.*

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The letter from Jennifer Newstead, attached as Exhibit A to the statement of interest, is excerpted below and also available at https://www.state.gov/digest-of-united-states-practice-in-international-law/.

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It is the view of the Department of State that the Diplomatic Relations Act (DRA) does not provide diplomatic immunity to the individual DRC defendants. The United States generally interprets the DRA to apply to diplomats assigned to missions in the United States, and has never

interpreted it to apply to visiting foreign officials who are no longer in the United States. The Department's Office of Foreign Missions conducted a records check and reported that none of the individual DRC defendants had been notified to the State Department as current or former members of the DRC's diplomatic mission in the United States. The individual DRC defendants thus do not benefit from diplomatic immunity under the DRA.

In addition, the Department has considered whether the individual DRC defendants would be entitled to conduct-based immunity for official acts. Due to the lack of clear factual information available to the Department regarding the individual DRC defendants' involvement in the incident underlying the complaint, however, the Department is not in a position to reach a conclusion on whether they would benefit from conduct-based immunity. However, the Department believes it would be appropriate to advise the Court of the governing conduct-based immunity principles applicable to the circumstances of this case.

The State Department follows an internal procedure to evaluate requests for conduct-based immunity for foreign officials, taking into account principles of immunity articulated by the Executive Branch in the exercise of its constitutional authority over foreign affairs and informed by customary international law, and considering the overall impact of the matter on the foreign policy of the United States. As a general matter, acts of defendant foreign officials who are sued for exercising the powers of their office are treated as acts taken in an official capacity for which a determination of immunity is appropriate. *See, e.g.,* Letter from Legal Adviser Brian J. Egan to Principal Deputy Assistant Attorney General Benjamin C. Mizer at 2 (June 10, 2016), filed in *Dogan et al.* v. *Barak,* No. 2:15-cv-8130 (C.D. Cal.) *[hereinafter, "Dogan* Letter"]; Letter from Legal Adviser Harold Hongju Koh to Acting Assistant Attorney General Stuart F. Delery at 1 (Sept. 7, 2012), filed in *Doe* v. *Zedillo,* No. 3:1 l-cv-01433-AWT (D. Conn.) *[hereinafter, "Zedillo* Letter"] …

Here, Plaintiffs allege that security officials accompanying President Joseph Kabila physically attacked the Plaintiffs and subsequently ransacked their car and removed their possessions. … However, beyond the Plaintiffs' allegations that two of the individual DRC defendants were present during the attack, there appears to be no specific information in the complaint about the actions or involvement of the individual DRC defendants. In addition, information available to the Department indicates that none of the individual DRC defendants were security officials for the DRC: according to information available to the Department, Raymond Tshibanda was the Foreign Minister; Seraphin Ngwej was the Ambassador-at-Large for the Great Lakes Region and Presidential Advisor; Jacques Mukaleng Makal was the Director of Presidential Press; Sam Mpengo Mbey was the Chief Executive Officer of the publication "Grands Lacs," a publication devoted to the activities of the Head of State; and Jean Marie Kassamba was the Chief Executive Officer and Journalist at "Tele50." Finally, law enforcement reports available to the Department indicate that different individuals were responsible for the attack on the Plaintiffs.

As a general matter, if the Court finds that the Plaintiffs' allegations could be substantiated against the individual DRC defendants named in the Second Amended Complaint, and concludes that this attack was an entirely unprovoked attack on peaceful protesters exercising their First Amendment rights, it would not constitute an official act for which conduct-based immunity would be available. In particular, the allegations as described by the Plaintiffs here, including the fact that the alleged attack was entirely unprovoked and occurred after President Kabila was inside the hotel, suggest that any physical contact with the Plaintiffs was not reasonably connected to carrying out the functions of ensuring the President's security.

It is also unclear how the alleged theft of the Plaintiffs' personal items, as pled, could relate to actions taken while exercising the powers of their office. Finally, given that none of the individual DRC defendants were security officials for the DRC, it is unclear how the allegations here regarding protection of the President would fall within their official functions.

On the other hand, if the Court finds that the individual DRC defendants are named in this action due to their official positions, and that they were not responsible for an entirely unprovoked attack against peaceful protesters exercising their First Amendment rights, the State Department would recognize their immunity from this suit. *See, e.g.*, *Zedillo* Letter at 2 (asserting immunity where plaintiffs sought to hold former President liable simply because he was serving as President when lower-level officials allegedly committed tortious acts).

* * * *

2. *Doğan v. Barak*

The U.S. Court of Appeals for the Ninth Circuit issued a decision on August 2, 2019, upholding the district court's dismissal of the suit against former Israeli Defense Minister Ehud Barak. *Doğan v. Barak*, 932 F.3d 888 (9th Cir. 2019). The United States submitted a suggestion of immunity in the district court, see *Digest 2016* at 163-64 & 450-52, and an *amicus* brief in the U.S. Court of Appeals for the Ninth Circuit, see *Digest 2017* at 449-54. Plaintiffs sued after their son was killed by Israeli Defense Forces ("IDF"), alleging that Barak commanded the attack that led to their son's death. The court's opinion is excerpted below, with footnotes omitted.

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* * * *

As both parties recognize, the doctrine of foreign sovereign immunity—including foreign official immunity— developed as a matter of common law. *See Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116 (1812); *see also Samantar v. Yousuf*, 560 U.S. 305, 311 (2010) (reaffirming that foreign official immunity is governed by common law). The Supreme Court has noted that a two-step procedure is used to resolve a foreign state's claim of common law immunity. *Id.* at 311-12. At the first step, "the diplomatic representative of the sovereign could request a 'suggestion of immunity' from the State Department." *Id.* at 311. Generally, "[i]f the request [i]s granted, the district court surrender[s] its jurisdiction." *Id.* at 311. However, "in the absence of recognition of the immunity by the Department of State," a court moves to the second step, where it has "authority to decide for itself whether all the requisites for such immunity exist[ ]." *Id.* The court grants immunity at step two if it determines that "the ground of immunity is one which it is the established policy of the [State Department] to recognize." *Id.* at 312 (quoting *Republic of Mexico v. Hoffman*, 324 U.S. 30, 36 (1945)).

In *Samantar*, the Supreme Court noted that "the same two-step procedure was typically followed when a foreign official asserted immunity." *Id*. But *Samantar* stands principally for the proposition that the Foreign Sovereign Immunities Act of 1976 does not govern sovereign immunity over individual foreign officials. *Samantar*, 560 U.S. at 308. Emphasizing the

narrowness of its holding, the Supreme Court remanded for the district court to consider "in the first instance," "[w]hether petitioner may be entitled to immunity under the common law …." *Id.* at 325–26. On remand, the Fourth Circuit held that the State Department's immunity determination "carrie[d] substantial weight" but was not dispositive. *Yousuf v. Samantar*, 699 F.3d 763, 773 (4th Cir. 2012) (hereinafter "*Yousuf*"). In so holding, the court distinguished between conduct-based immunity that arises from a foreign official's duties, and status-based immunity that arises from a foreign official's status as a head-of-state. *Id*. at 772–73. Regarding the latter, the Fourth Circuit held that a determination from the State Department is likely controlling. But in *Yousuf*, the defendant was not a head-of-state, and therefore the Fourth Circuit engaged in an independent analysis (although giving "substantial weight" to the State Department's suggestion of non-immunity) to determine that the defendant was not entitled to immunity. *Id.* at 777–78.

The Doğans urge us to adopt the Fourth Circuit's approach. But we need not decide the level of deference owed to the State Department's suggestion of immunity in this case, because even if the suggestion of immunity is afforded "substantial weight" (as opposed to absolute deference), based on the record before us we conclude that Barak would still be entitled to immunity. Common-law foreign sovereign immunity extends to individual foreign officials for "acts performed in [their] official capacity if the effect of exercising jurisdiction would be to enforce a rule of law against the state[.]" Restatement (Second) of Foreign Relations Law § 66(f) (1965). According to the Complaint, Barak was "instructed by the Prime Minister to conduct" the operations. The Complaint further alleged that Barak's "power … to plan, order, and control the IDF operation and troops as Minister of Defense is set out in Israel's Basic Law[.]" The Complaint's claims for relief state—several times—that Barak's actions were done under "actual or apparent authority, or color of law, of the Israeli Ministry of Defense and the Government of the State of Israel." And if the State Department's SOI is not entitled to absolute deference, we would nonetheless give it considerable weight. We conclude that exercising jurisdiction over Barak in this case would be to enforce a rule of law against the sovereign state of Israel, and that Barak would therefore be entitled to common-law foreign sovereign immunity even under the Doğans' preferred standard (i.e., conducting an independent judicial determination of entitlement to immunity).

III

Next, the Doğans argue that even if Barak is entitled to common law immunity, Congress has abrogated common law foreign official immunity via the TVPA. The TVPA provides:

> An individual who, under actual or apparent authority, or color of law, of any foreign nation—
>
> (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or
>
> (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

28 U.S.C. § 1350, note § 2(a). The Doğans contend that the TVPA's plain language unambiguously imposes liability on any foreign official who engages in extrajudicial killings. Thus, the question is whether Barak's common law immunity is abrogated by the text of the TVPA.

The Supreme Court has held that courts should "proceed on the assumption that common-law principles of ... immunity were incorporated into our judicial system and that they should not be abrogated absent clear legislative intent to do so." *Filarsky v. Delia*, 566 U.S. 377, 389 (2012) (alteration incorporated) (*quoting Pulliam v. Allen*, 466 U.S. 522, 529 (1984)). Thus, even where "the statute on its face admits of no immunities," the Court will read it "in harmony with general principles of tort immunities and defenses rather than in derogation of them." *Malley v. Briggs*, 475 U.S. 335, 339 (1986) (*quoting Imbler v. Pachtman*, 424 U.S. 409, 418 (1976)). Here, although the TVPA purports to impose liability on any "individual who, under actual or apparent authority, or color of law, of any foreign nation" engages in torture or an extrajudicial killing, the statute itself does not expressly abrogate any common law immunities.

Our statutory analysis is also guided by the examination of "the language of related or similar statutes." *City & Cty. of S.F. v. United States Dep't of Transp.*, 796 F.3d 993, 998 (9th Cir. 2015). Here, the most helpful analogue in determining whether the TVPA abrogates common law immunities is 42 U.S.C. § 1983. The Doğans agree that "Section 1983 jurisprudence is highly relevant to the Court's analysis of the TVPA." Section 1983, much like the TVPA, imposes liability on "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State" deprives another of a constitutional right. Even with this all-encompassing language ("[e]very person"), the Supreme Court has held that, in passing § 1983, Congress did not "abolish wholesale all common-law immunities." *Pierson v. Ray*, 386 U.S. 547, 554 (1967). Indeed, the Court in *Pierson* held that, even though the word "person" includes legislators and judges, for example, § 1983 did not abrogate common law legislative or judicial immunity. *Id.* at 554–55. It follows that, to the extent this court relies on § 1983 jurisprudence in analyzing the TVPA, the statute's use of the overinclusive term "individual" does not abrogate the immunity given to foreign officials at common law simply because foreign officials fit within the category "individual."

Given that (1) the TVPA is silent as to whether any common law immunities are abrogated and (2) the term "individual" does not imply abrogation of common law immunities for *all* individuals, we "assum[e] that common-law principles of …immunity were incorporated" into the TVPA. *Filarsky*, 566 U.S. at 389.

Other considerations counsel against construing the TVPA to abrogate common law foreign official immunity. As the district court observed, "[i]f immunity did not extend to officials whose governments acknowledge that their acts were officially authorized, it would open a Pandora's box of liability for foreign military officials." Indeed, "any military operation that results in injury or death could be characterized at the pleading stage as torture or an extra-judicial killing." And the TVPA allows suits not only by U.S. citizens but by "any person." Because the whole point of immunity is to enjoy "an immunity from *suit* rather than a mere defense to *liability*," the Doğans' reading of the TVPA would effectively extinguish the common law doctrine of foreign official immunity. *Compania Mexicana de Aviacion, S.A. v. U.S. Dist. Court*, 859 F.2d 1354, 1358 (9th Cir. 1988) (per curiam) (emphasis added). Under the Doğans' reading, the TVPA would allow foreign officials to be haled into U.S. courts by "any person" with a family member who had been killed abroad in the course of a military operation conducted by a foreign power. The Judiciary, as a result, would be faced with resolving any number of sensitive foreign policy questions which might arise in the context of such lawsuits. It simply cannot be that Congress intended the TVPA to open the door to that sort of litigation.

Nor does Barak's reading of the TVPA render the statute a nullity, as the Doğans contend. The parties agree that Congress expected foreign states would generally disavow

conduct that violates the TVPA because no state officially condones such actions. Thus, in the great majority of cases, an official sued under the TVPA would never receive common-law immunity in the first place, thereby making abrogation unnecessary. Barak points to two examples of this, which adequately prove the point. First, in *Hilao v. Marcos*, 25 F.3d 1467 (9th Cir. 1994), plaintiffs brought claims against the estate of former Filipino dictator Ferdinand Marcos, based on allegations of torture and extrajudicial killings. The Filipino government expressly denied that Marcos's conduct had been performed in an official capacity and urged that the lawsuits be allowed to proceed. *Id.* at 1472. Likewise, in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), plaintiffs brought an action against a former Paraguayan police official based on allegations that he was responsible for the death of their son. In discussing the act of state doctrine, the Second Circuit noted that the defendant's conduct had been "wholly unratified by [the Paraguayan] government." In cases like *Hilao* and *Filartiga*, the TVPA would operate to impose liability on foreign officials who engaged in torture or extrajudicial killings. Thus, our holding today does not render the TVPA a nullity.

For the foregoing reasons, we hold that the TVPA does not abrogate foreign official immunity.

IV

The Doğans next urge this court to hold that foreign officials are not immune from suit for violations of *jus cogens* norms. Under the circumstances of this case, we decline to recognize this exception to foreign official immunity.

At least three circuits have considered whether to create an exception to foreign official immunity for *jus cogens* violations. The Doğans urge this court to follow the approach taken by the Fourth Circuit in *Yousuf* (post-remand from the Supreme Court). 699 F.3d at 777. After the Supreme Court denied Samantar immunity under the FSIA and remanded for consideration of foreign official immunity at common law, the Fourth Circuit held that "officials from other countries are not entitled to foreign official immunity for *jus cogens* violations, even if the acts were performed in the defendant's official capacity." *Id.* at 777. The court explained that *jus cogens* violations should be excepted from the doctrine of foreign official immunity because they are, "by definition, acts that are not officially authorized by the Sovereign." *Id.* at 776.

In examining this same question below, the district court found the Second Circuit's opinion in *Matar v. Dichter* more persuasive. 563 F.3d 9 (2d Cir. 2009). In *Matar*, plaintiffs sued the former head of the Israeli Security Agency for his role in an Israel-sanctioned bombing which killed the leader of a terrorist group, but which also incidentally killed the plaintiffs' family members. *Id.* at 10–11. The Israeli official, Avraham Dichter, argued that he enjoyed foreign official immunity. Because *Matar* was decided pre-*Samantar*, the Second Circuit analyzed immunity alternatively under both the FSIA and the common law. The court reiterated that "there is no general *jus cogens* exception to FSIA immunity." *Id.* at 14. And, relying on the State Department's statement of interest in favor of immunity, the court held that Dichter was entitled to common law foreign official immunity. *Id.* at 15 ("The Executive Branch's determination that a foreign [head-of-state] should be immune from suit even where the [head-of-state] is accused of acts that violate *jus cogens* norms is established by a suggestion of immunity.") (*quoting Ye v. Zemin*, 383 F.3d 620, 627 (7th Cir. 2004)).

The Doğans frame their argument as a request that this court adopt the Fourth Circuit's view. But they actually ask this court to go one step further than the Fourth Circuit went in *Yousuf*. In *Yousuf*, the State Department had filed a "suggestion of non-immunity," highlighting the facts that (1) the defendant was "a former official of a state with no currently recognized

government to request immunity on his behalf" and (2) he was a U.S. legal permanent resident, enjoying "the protections of U.S. law," and thus "should be subject to the jurisdiction of the courts." *Yousuf*, 699 F.3d at 777. Although the court ultimately held that foreign officials are not immune for *jus cogens* violations, it did not have occasion to consider whether that should be the case where the foreign sovereign has ratified the defendant's conduct and the State Department files a Suggestion of Immunity on his behalf. *Id.* at 776 ("However, as a matter of international and domestic law, *jus cogens* violations are, by definition, acts that are not officially authorized by the Sovereign.") (*citing Siderman*, 965 F.2d at 718). Thus, the court in *Yousuf* had no occasion to consider whether *jus cogens* violations should be an *exception* to foreign official immunity because, as in the *Marcos* cases, the defendant was never given immunity in the first place. As far as we can tell, no court has ever carved out an exception to foreign official immunity under the circumstances presented here. We also decline to do so.

* * * *

3. *France.com v. The French Republic*

On December 4, 2019 the United States filed a suggestion of immunity on behalf of French Foreign Minister Jean-Yves Le Drian. *France.com v. The French Republic, et al.*, No. 18-cv-00460 (E.D. Va.). The district court issued an order on December 6, deferring to the U.S. suggestion of immunity and dismissing the claims as to Le Drian. The suggestion of immunity is excerpted below. The suggestion of immunity, letter from Marik A. String ("Exhibit 1"), and the court's order are available at https://www.state.gov/digest-of-united-states-practice-in-international-law/.

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* * * *

The Office of the Legal Adviser of the Department of State has informed the Department of Justice that the Embassy of France has formally requested the Government of the United States to inform the Court that Foreign Minister Le Drian is immune from this lawsuit. The Office of the Legal Adviser has further informed the Department of Justice that the "Department of State recognizes and allows the immunity of Foreign Minister Le Drian as a sitting foreign minister from the jurisdiction of the United States District Court in this suit." Letter from Marik String to Joseph H. Hunt (copy attached as Exhibit 1).

3. The immunity of foreign states and foreign officials from suit in our courts has different sources. For many years, such immunity was determined exclusively by the Executive Branch, and courts deferred completely to the Executive's foreign sovereign immunity determinations. …

4. As the Supreme Court has explained, however, Congress has not similarly codified standards governing the immunity of foreign officials from suit in our courts. *Samantar v. Yousuf*, 560 U.S. 305, 325 (2010) … Instead, when it codified the principles governing the immunity of foreign states, Congress left in place the practice of judicial deference to Executive Branch immunity determinations with respect to foreign officials. *See id.* at 323 …Thus, the Executive Branch retains its historic authority to determine a foreign official's immunity from

suit, including the immunity of foreign heads of state, heads of government, and foreign ministers. *See id.* at 311 & n.6 (noting the Executive Branch's role in determining head of state immunity).

5. The doctrine of head of state immunity is well established in customary international law "pursuant to which an incumbent 'head of state is immune from the jurisdiction of a foreign state's courts.'" *Yousuf v. Samantar*, 699 F.3d 763, 769 (4th Cir. 2012) (quoting *In re Grand Jury Proceedings*, 817 F.2d 1108, 1110 (4th Cir. 1987)); *see also* SATOW'S DIPLOMATIC PRACTICE 9 (Lord Gore-Booth ed., 5th ed. 1979). Although the doctrine is referred to as "head of state immunity," it applies to heads of government and foreign ministers as well. *See Republic of Austria v. Altmann*, 541 U.S. 677, 688 (2004) (noting that *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812), "generally viewed as the source of our foreign sovereign immunity jurisprudence," found that "members of the international community had implicitly agreed to waive the exercise of jurisdiction over other sovereigns in certain classes of cases, such as those involving foreign ministers or the person of the sovereign"); *accord* Restatement (Second) of Foreign Relations Law §§ 65, 66 (1965) (noting that the immunity of a foreign state is enjoyed by heads of state, heads of government, and foreign ministers). Thus, U.S. courts, beginning with the Supreme Court in *Schooner Exchange*, have specifically recognized the immunity of sitting foreign ministers based on their status. *See, e.g.*, *Force v. Sein*, No. 15-cv-7772-LGS, 2016 WL 1261139, *1 (S.D.N.Y. Mar. 20, 2016) (recognizing application of head of state immunity to Myanmar's foreign minister); *Tachiona v. Mugabe*, 169 F. Supp. 2d 259, 296–97 (S.D.N.Y. 2001) (recognizing application of head of state immunity to Zimbabwe's foreign minister), *rev'd in part on other grounds*, *Tachiona v. United States*, 386 F.3d 205 (2d Cir. 2004).

6. In the United States, head-of-state immunity determinations are made by the Department of State, exercising the President's authority in the field of foreign affairs. The Supreme Court has held that the courts of the United States are bound by Suggestions of Immunity submitted by the Executive Branch. *See Hoffman*, 324 U.S. at 35–36; *Ex parte Republic of Peru*, 318 U.S. 578, 588–89 (1943). In *Ex parte Republic of Peru*, the Supreme Court decided, in the context of pre-FSIA foreign state immunity, that "[u]pon recognition and allowance of the [immunity] claim by the State Department and certification of its action presented to the court by the Attorney General, it is the court's duty to surrender the [matter] and remit the libelant to the relief obtainable through diplomatic negotiations." 318 U.S. at 588; *see also id.* at 589 ("The certification and the request [of immunity] …must be accepted by the courts as a conclusive determination by the political arm of the Government."). Such deference to the Executive Branch's determinations of foreign state immunity is compelled by the separation of powers. *See, e.g.*, *Spacil v. Crowe*, 489 F.2d 614, 619 (5th Cir. 1974) ("Separation-of-powers principles impel a reluctance in the judiciary to interfere with or embarrass the executive in its constitutional role as the nation's primary organ of international policy." (citation omitted)).

7. For the same reason, courts have also routinely deferred to the Executive Branch's immunity determinations concerning sitting heads of state, heads of government, and foreign ministers. *See, e.g.*, *Samantar*, 699 F.3d at 772 ("[C]onsistent with the Executive's constitutionally delegated powers and the historical practice of the courts, we conclude that the State Department's pronouncement as to head-of-state immunity is entitled to absolute deference."); *Habyarimana v. Kagame*, 696 F.3d 1029, 1032 (10th Cir. 2012) ("We must accept the United States' suggestion that a foreign head of state is immune from suit—even for acts committed prior to assuming office—as a conclusive determination by the political arm of the

Government that the continued [exercise of jurisdiction] interferes with the proper conduct of our foreign relations." (internal quotations marks omitted)); *Ye v. Jiang Zemin*, 383 F.3d 620, 626 (7th Cir. 2004) ("The obligation of the Judicial Branch is clear—a determination by the Executive Branch that a foreign head of state is immune from suit is conclusive and a court must accept such a determination without reference to the underlying claims of a plaintiff."); *Miango v. Democratic Republic of Congo*, No. 15-1265-ABJ, 2019 WL 2191806, *2 (D.D.C. Jan. 19, 2019) ("Courts are bound by Suggestions of Immunity submitted by the Executive Branch." (citations omitted)).

8. When the Executive Branch makes a determination that a sitting head of state, head of government, or foreign minister is immune from suit, judicial deference to that determination is predicated on compelling considerations arising out of the Executive Branch's authority to conduct foreign affairs under the Constitution. *See Ye*, 383 F.3d at 626. Judicial deference to the Executive Branch in these matters, the Seventh Circuit noted, is "motivated by the caution we believe appropriate of the Judicial Branch when the conduct of foreign affairs is involved." *Id.*; *see also Ex parte Peru*, 318 U.S. at 588; *Spacil*, 489 F.2d at 619). As noted above, in no case has a court subjected a sitting head of state, head of government, or foreign minister to suit after the Executive Branch has determined that the head of state, head of government, or foreign minister is immune.

9. Under the customary international law principles accepted by the Executive Branch, head of state immunity attaches to a foreign minister's status as the current holder of that office. In this case, because the Executive Branch has determined that Foreign Minister Le Drian, as the sitting Minister of Foreign Affairs of the French Republic, enjoys head of state immunity from the jurisdiction of U.S. courts in light of his current status, Foreign Minister Le Drian is entitled to immunity from the jurisdiction of this Court over this suit.

* * * *

C. DIPLOMATIC, CONSULAR, AND OTHER PRIVILEGES AND IMMUNITIES

1. Determinations under the Foreign Missions Act

a. Requirement for certain PRC military personnel in the United States to provide advance notice of domestic travel

On October 21, 2019, the State Department published a determination pursuant to the Foreign Missions Act, 22 U.S.C. § 4301, *et seq.*, regarding travel by military personnel assigned to the Embassy of the People's Republic of China ("PRC") or its consular posts in the United States. 84 Fed. Reg. 56,280 (Oct. 21, 2019). The Director of the Office of Foreign Missions determined it was necessary

> to require all Chinese military personnel assigned to the Embassy of the People's Republic of China or its consular posts in the United States, including PRC military personnel temporarily working in the United States, to provide prior notification of their plans to travel for either official or personal purposes beyond a 25 miles radius of their post of assignment or destination city if present

> in the United States on a short-term assignment, regardless of their mode of transportation or destination.

Id.

b. Requirement of advance notice for certain meetings with and travel by PRC personnel in the United States

Also on October 21, 2019, the State Department published a designation and determination pursuant to the Foreign Missions Act regarding official meetings planned with representatives of state, local, and municipal governments in the United States and its territories involving members of the PRC's foreign missions in the United States, as well as official travel by PRC foreign mission members to educational and research institutions. 84 Fed. Reg. 56,281 (Oct. 21, 2019). The Director of the Office of Foreign Missions determined that the official meetings described above constitute a "benefit under the Act," and that it was necessary

> to require all Chinese members of the People's Republic of China's foreign missions in the United States, including its representatives temporarily working in the United States, and accompanying Chinese dependents and members of their households to submit prior notification to the Office of Foreign Missions of:
>
> 1. All official meetings with representatives of state, local, and municipal governments in the United States and its territories;
> 2. All official visits to educational institutions (public or private) in the United States and its territories; and
> 3. All official visits to research institutions (public or private), including national laboratories, in the United States and its territories.

Id.

On October 16, 2019, the State Department held a briefing explaining the action being taken toward Chinese diplomats with respect to their meetings within the United States. The briefing is excerpted below and available at https://www.state.gov/briefing-with-senior-state-department-officials-on-reciprocal-action-regarding-chinese-diplomats-in-the-united-states/.

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* * * *

[S]tarting from today, the State Department is going to be requiring that all of the PRC foreign missions—their embassy and their various consulates around the United States—will have to notify the Department of State in advance of official meetings with state officials, official meetings with local and municipal officials, official visits to educational institutions, and official visits to research institutions.

Now, I want to be very, very clear on this point. We absolutely value educational and cultural exchange. We absolutely encourage state and local officials, as well as educational and research institutions, to meet with and host foreign officials as they deem appropriate. We are not requiring that any Chinese official get permission from the State Department to have any of these sorts of meetings. We're merely asking that they notify us in advance of such meetings—which, again, that's different from what happens many times in China, where our diplomats are forced to seek permission and are often denied such permission.

… State, local, educational officials—none of them have to take any actions whatsoever. The full onus will fall on the Chinese consulates and embassy to notify us in advance of meetings with these stakeholders.

…[T]his action is a response to what the PRC government does to limit the interactions our diplomats can have in China with Chinese stakeholders. Our goal is to get the Chinese authorities to allow our diplomats in China to engage with provincial and local leaders, Chinese universities, and other educational and research institutes freely, the same way that the Chinese diplomats are able to do here.

* * * *

2. Enhanced Consular Immunities

As discussed in *Digest 2016* at 463, Section 501 of the Department of State Authorities Act, Fiscal Year 2017, Pub. L. No. 114-323 (codified at 22 U.S.C. § 254(c)), amended the Diplomatic Relations Act to include permanent authority for the Secretary of State to extend enhanced privileges and immunities to consular posts and their personnel on the basis of reciprocity. See also *Digest 2015* at 436-37.

The "Agreement Between the United States of America and the Government of the Republic of Kazakhstan Regarding Consular Privileges and Immunities," was signed on May 3, 2019. Under that agreement the United States and Kazakhstan reciprocally extend enhanced protections for consular posts, consular officers and consular employees and their family members. The full text of the Agreement is available at https://www.state.gov/digest-of-united-states-practice-in-international-law/.

3. Attempts to Effect Service by Mail to Mexican Embassy

On November 22, 2019, the United States submitted a statement of interest regarding multiple cases in family court in Delaware in which legal documents were mailed to the Mexican Embassy in Washington, D.C. to attempt to effect service upon private Mexican nationals or residents. The United States previously advised Delaware courts in 2016 of the impropriety of this form of service under the Vienna Convention on Diplomatic Relations ("VCDR"). See *Digest 2016* at 420-23. The 2019 statement urges the Delaware courts to recognize the impropriety of service via the embassy and require that service be effected in an alternate manner. Excerpts follow from the U.S. statement of interest,

which is available in full at https://www.state.gov/digest-of-united-states-practice-in-international-law/.

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* * * *

The Mexican embassy is inviolable and, as such, may not serve as an agent for service of process. First, the VCDR provides, in relevant part, that "the premises of [a] mission shall be inviolable." 23 U.S.T. 3227, 500 U.N.T.S. 95, art. 22. Although the treaty does not define "inviolable," courts have held that this principle must be construed broadly, and is violated by service of process—whether on the inviolable entity for itself or as an agent for the foreign government or a private, non-immune party. *See Tachiona v. United States,* 386 F.3d 205, 222, 224 (2d Cir. 2004) (holding that the VCDR precludes service of process on inviolable persons entitled to diplomatic immunity where such persons are served on behalf of a non-immune, private entity); *Autotech Techs. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 748 (7th Cir. 2007) ("[S]ervice through an embassy is expressly banned both by an international treaty to which he United States is a party and by U.S. statutory law."); *Hellenic Lines, Ltd. v. Moore,* 345 F.2d 978, 979-81 (D.C. Cir. 1965) (holding that the inviolability principle precludes service of process on a diplomat as agent of a foreign government); *767 Third Ave. Assocs. v. Permanent Mission of Republic of Zaire to UN*, 988 F.2d 295, 301 (2d Cir. 1993) (approvingly citing the view that "process servers may not even serve papers without entering at the door of a mission because that would 'constitute an infringement of the respect due to the mission'"); James R. Crawford, *Brownlie's Principles of Public Int'l Law* 403 (8th ed.2012) ("[W]rits may not be served, even by post, within the premises of a mission ...").

Courts in the United States have held that this principle prevents service on the embassy as an agent for a private, non-immune party. For example, the United States Court of Appeals for the Second Circuit rejected an attempt to serve process on the President of Zimbabwe and the Zimbabwean Foreign Minister as agents of a private political party while they visited New York City as delegates to the United Nations Millennium Summit. *Tachiona,* 386 F.3d at 209. …

In these cases, just as in *Tachiona,* service on a private party has been attempted by way of an entity protected by inviolability pursuant to the VCDR. The inviolability of the embassy should be as broadly construed here, as it was in *Tachiona,* and the Court should recognize that the VDCR prohibits service of process in this manner.

Second, the legislative history of the Foreign Sovereign Immunities Act (the "FSIA"**),** which governs suits against foreign governments, demonstrates that Congress explicitly recognizes that service via an embassy would be at odds with the VCDR. The House Report for the FSIA states that a "second means [of service], of questionable validity, involves the mailing of a copy of the summons and complaint to a diplomatic mission of the foreign state. Section 1608 [of the FSIA) precludes this method so as to avoid questions of inconsistency with section 1 of article 22 of the Vienna Convention on Diplomatic Relations .... Service on an embassy by mail would be precluded under this bill." H.R. Rep. No. 94-1487, 94th Cong., 2d Sess., *reprinted in* 1976 U.S.C.C.A.N. 6604, 6625. The House Report also approvingly references cases in which courts recognized the impropriety of service on inviolable diplomatic representatives. *See id.* at 6620 ("It is also contemplated that the courts will not direct service in the United States upon diplomatic representatives, *Hellenic Lines Ltd. v. Moore,* 345 F.2d 978 (D.C. Cir. I965), or upon

consular representatives, *Oster v. Dominion of Canada*, 144 F. Supp. 746 (N.D.N.Y. 1956), *aff'd* 238 F.2d 400 (2d Cir. 1956).").

Third, the United States has strong reciprocity interests at stake. Permitting courts in the United States to treat foreign embassies as a forwarding agent for purposes of litigation that does not involve the foreign government itself would result in the diversion of embassy resources, such as the time and effort needed to determine the significance of a transmission from the court and to assess whether or how to respond. Indeed, the Mexican Embassy has been served in almost half-a-dozen cases from Delaware state courts alone in less than six months, demonstrating the significant impact that allowing such service would have. Consequently, the United States has long maintained that its embassies abroad are not agents for service of process. When a foreign court or litigant purports to serve a U.S. resident or national through an embassy, the embassy sends a diplomatic note to the foreign government indicating that the embassy is not an agent for service of process and therefore that service on the individual has not been effected, just as the Mexican Embassy has done in these cases. If the VCDR were interpreted to permit courts in the United States to serve papers through an embassy, it could make United States embassies abroad vulnerable to similar treatment in foreign courts, contrary to the United States' consistently asserted view of the law. *See, e.g., Medellin v. Texas*, 552 U.S. 491, 524 (2008) (noting that the United States' interests, including its interests in "ensuring the reciprocal observance of the Vienna Convention [on Consular Relations]," are "plainly compelling").

* * * *

4. Vienna Convention on Diplomatic Relations ("VCDR")

a. Broidy v. Benomar

On October 9, 2019, the United States filed an amicus brief at the invitation of the U.S. Court of Appeals for the Second Circuit in *Broidy Capital Management LLC & Elliott Broidy v. Jamal Benomar*, No. 19-236 (2d. Cir.). Plaintiffs alleged that Jamal Benomar—a member of Morocco's Mission to the UN—schemed with the State of Qatar to disseminate documents, allegedly obtained through hacking into plaintiffs' computer system, in order to discredit plaintiffs in the media. The district court dismissed the claims holding that Benomar was immune. The issue in the case was whether an exception to the comprehensive immunity from civil jurisdiction enjoyed by individuals with diplomatic agent status applied, specifically for "an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions." Excerpts follow (with record cites and footnotes omitted) from the U.S. brief supporting Benomar's claim of diplomatic immunity under the UN Headquarters Agreement, under which members of permanent missions to the United Nations with a diplomatic title are accorded the same immunities as apply to diplomatic agents under the VCDR. The brief is available at https://www.state.gov/digest-of-united-states-practice-in-international-law/.

* * * *

I. The defendant is entitled to diplomatic immunity

A. The Vienna Convention's commercial-activities exception does not apply to conduct before the diplomat obtained status-based immunity

To interpret a treaty such as the Vienna Convention, a court "begin[s] with the text of the treaty and the context in which the written words are used." *Tachiona v. United States*, 386 F.3d 205, 216 (2d Cir. 2004). But treaties "are construed more liberally than private agreements, and to ascertain their meaning [a court] may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Id.*

1. The Vienna Convention provides that a diplomat "shall * * * enjoy immunity from its civil and administrative jurisdiction," subject to limited exceptions. 23 U.S.T. at 3240 (Art. 31(1)); see id. at 3245 ("Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State on proceeding to take up his post or, if already in its territory, from the moment when his appointment is notified to the Ministry for Foreign Affairs or such other ministry as may be agreed." (Art. 39(1)). As the text of that provision makes clear, diplomatic immunity under the Vienna Convention is status-based. Unless an exception to immunity applies, the diplomat "shall" enjoy immunity from a receiving State's "civil and administrative jurisdiction." An individual with diplomatic status shall enjoy immunity not only with respect to actions based on conduct that occurred during the period in which the accredited diplomat serves in a diplomatic role, but also with respect to suits based on conduct that occurred before the individual became a diplomat. As a result, "diplomatic immunity flowing from that status serves as a defense to suits already commenced" for conduct preceding the diplomat's service. *Abdulaziz*, 741 F.2d at 1329-30; see *United States v. Khobragade*, 15 F. Supp. 3d 383, 387 (S.D.N.Y. 2014) ("[D]iplomatic immunity acquired during the pendency of proceedings destroys jurisdiction even if the suit was validly commenced before immunity applied."); *Fun v. Pulgar*, 993 F. Supp. 2d 470, 474 (D.N.J. 2014) (similar); *Republic of Philippines v. Marcos*, 665 F. Supp. 793, 799 (N.D. Cal. 1987) (similar). As one leading commentator has explained, "if the defendant becomes entitled to immunity he may raise it as a bar to proceedings relating to prior events or to proceedings already instituted against him, and the courts must discontinue any such proceedings if they accept his entitlement." Eileen Denza, Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations 257 (4th ed. 2016).

Conversely, "diplomats lose much of their immunity following the termination of their diplomatic status." *Swarna*, 622 F.3d at 133. Under Article 39(2) of the Vienna Convention, "[w]hen the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so." 23 U.S.T. at 3245. And "once a diplomat becomes a 'former' diplomat, he or she is not immune from suit for prior acts unless those acts were performed 'in the exercise of [the former diplomat's] functions as a member of the mission.'" *Swarna*, 622 F.3d at 134 (quoting Art. 39(2)).

Unlike status-based immunity that applies to conduct preceding the diplomat's tenure, the Vienna Convention's commercial-activities exception is more circumscribed in its application, which depends on when the alleged conduct occurred. That exception applies narrowly to "an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions." 23 U.S.T. at 3241 (Art. 31(1)(c)) (emphasis

added). Before obtaining diplomatic status, an individual is not a "diplomatic agent" with "official functions." The plain text of that provision thus demonstrates that it applies only to conduct undertaken during the diplomat's service. Unlike immunity, the exception does not apply for acts that predate a diplomat's accreditation. And unless another exception applies, the diplomat "shall" enjoy immunity from a receiving State's "civil and administrative jurisdiction."

This Court has previously resisted arguments to interpret Article 31(1)'s exceptions broadly. In *Tachiona*, the Court held that any professional or commercial activities that occurred outside "the receiving State" did not satisfy the commercial-activities exception even if the defendant engaged in other conduct in the receiving State. 386 F.3d at 220. A contrary ruling would have ignored the circumscribed textual scope of the exception. See also *Baoanan v. Baja*, 627 F. Supp. 2d 155, 161 (S.D.N.Y. 2009) (describing Article 31(1)'s exceptions as "narrow"). Although not directly on point, Tachiona is instructive because it demonstrates that the Court will not construe Article 31(1)'s commercial-activities exception broadly to ignore its plain text and diminish the diplomatic protections provided by the Vienna Convention.

2. The context of the Vienna Convention confirms that its commercial-activities exception does not apply where the alleged conduct occurred before the defendant obtained diplomatic status. The only other provision in the Vienna Convention that refers to "professional or commercial activity" is Article 42, which provides that "[a] diplomatic agent shall not in the receiving State practise for personal profit any professional or commercial activity." 23 U.S.T. at 3247. That reference clearly applies only to conduct by the diplomatic agent during his tenure as such.

Article 42 and Article 31(1)(c) thus work in tandem. Article 42 sets forth the prohibition against diplomats engaging in professional or commercial activities while Article 31(1) lifts immunity for violations of that prohibition. As the United States has previously explained, "Article 31(1)(c) works in conjunction with Article 42 to make clear that, if a diplomat does engage in such an activity, he does not have immunity from related civil actions." Statement of Interest of the United States at 5, *Gonzalez Paredes v. Vila*, 479 F. Supp. 2d 187 (D.D.C. 2007) (Dkt. No. 23); see B.S. Murty, The International Law of Diplomacy: The Diplomatic Instrument and World Public Order 356 (1989) ("'Professional or commercial' should be interpreted alike in Art. 31(1) and Art. 42"); Jonathan Brown, Diplomatic Immunity: State Practice under the Vienna Convention on Diplomatic Relations, 37 Int'l & Comp. L. Q. 53, 76 (1988) ("Diplomatic agents have a duty under Article 42 not to engage in any such activities but, in the event that they do, they could be sued in respect of them."). In other words, "Article 31(1)(c) was intended to reach those rare instances where a diplomatic agent ignores the restraints of his office and, contrary to Article 42, engages in such activity in the receiving State." *Tabion v. Mufti*, 877 F. Supp. 285, 291 (E.D. Va. 1995), aff'd, 73 F.3d 535 (4th Cir. 1996).

Article 42's prohibition against diplomats engaging in professional or commercial activity for personal profit reaffirms that the commercial-activities exception in Article 31(1) likewise refers only to actions taken while the individual is a diplomatic agent. If the two provisions did not work in tandem, a diplomat could be subject to litigation concerning conduct that predates the diplomat's service. But that litigation would harm the sending State by interfering with the diplomat's service even though he is in full compliance with Article 42.

3. The Vienna Convention's negotiating and drafting history removes any doubt that the commercial-activities exception may be triggered only by conduct the diplomat engages in while he serves in that capacity. During that negotiating history, the scope and necessity of an exception to immunity for commercial activity performed concurrently with a diplomat's

assignment was extensively debated. The discussion of the exception had nothing to do with conduct predating the diplomat's service.

The final version of the Vienna Convention evolved from an initial draft developed in a series of meetings of the United Nations International Law Commission (ILC), a body of international law experts. The draft for the Codification of the Law relating to Diplomatic Intercourse and Immunities proposed by the ILC's Special Rapporteur in 1955 contained no commercial-activities exception. During a 1957 ILC meeting, however, leading international law scholar and practitioner Alfred Verdross proposed an amendment providing an exception to immunity for an "act relating to a professional activity outside [the diplomatic agent's] official duties." 1957 U.N.Y.B. Int'l L. Comm'n 97. Verdross based the amendment on two sources: a 1929 resolution of the Institute of International Law, which provided that "[i]mmunity from jurisdiction may not be invoked by a diplomatic agent for acts relating to a professional activity outside his official duties," and the 1932 Harvard Draft Convention on Diplomatic Privileges and Immunities, which stated that "[a] receiving state may refuse to accord the privileges and immunities provided for in this convention to a member of a mission or to a member of his family who engages in a business or who practices a profession within its territory, other than that of the mission, with respect to acts done in connection with that other business or profession." *Id*. Neither Verdross's amendment nor its source material contemplated extending the exception beyond a diplomat whose activities fall outside official duties as a diplomat.

Discussion of Verdross's proposal focused on the actions of diplomats taken while in service. One ILC member "opposed the amendment as unnecessary" because "[d]iplomatic agents practically never engaged in any professional activity outside their official duties." 1957 U.N.Y.B. Int'l L. Comm'n 97 (comment of François). "If they did, and the receiving State objected, it could easily put an end to such activities by declaring the agent persona non grata." *Id*. A supporter of the amendment contended that "[t]he dignity itself of a diplomatic agent required that he should not engage in activities outside his official duties." *Id*. at 98 (comment of El-Erian). And the Special Rapporteur expressed his view that, "[t]o engage in a professional activity outside [the diplomat's] official duties would impair the dignity not merely of the diplomatic agent himself but of the whole mission." *Id*. (comment of Sandström). Indeed, the Special Rapporteur considered "the whole idea of a diplomatic agent engaging in any professional activity outside his official duties as repugnant." *Id*. (emphasis added). The discussion did not address prior commercial activities undertaken before a diplomat begins service, and instead centered on diplomats who act in derogation of their diplomatic status.

When the United States commented that the proposed commercial-activities exception went beyond existing international law, the Special Rapporteur responded by describing the exception in terms of activity that was inconsistent with diplomatic status: "It would be quite improper if a diplomatic agent, ignoring the restraints which his status ought to have imposed upon him, could, by claiming immunity, force the client to go abroad in order to have the case settled by a foreign court." Diplomatic Intercourse and Immunities: Summary of Observations Received from Governments and Conclusions of the Special Rapporteur, U.N. Doc. A/CN.4/116, at 55-56 (emphasis added). No mention was made of the exception applying to abrogate immunity based on conduct that occurred before any diplomatic status should have "imposed" any "restraints" on the individual.

The ILC's final draft addressing "[i]mmunity from jurisdiction" provided an exception for "[a]n action relating to a professional or commercial activity exercised by the diplomatic agent in the receiving State, and outside his official functions." 1958 U.N.Y.B. Int'l L. Comm'n

98. The Commentary to the provision reinforced that the exception is limited to acts inconsistent with the diplomatic agent's official functions. The Commentary explained that the exception "arises in the case of proceedings relating to a professional or commercial activity exercised by the diplomatic agent outside his official functions." *Id*. It also noted that, although "activities of these kinds are normally wholly inconsistent with the position of a diplomatic agent, and that one possible consequence of his engaging in them might be that he would be declared persona non grata," the exception was necessary because "such cases may occur and should be provided for, and if they do occur the persons with whom the diplomatic agent has had commercial or professional relations cannot be deprived of their ordinary remedies." *Id*.

The ILC's draft convention was considered at the United Nations Conference on Diplomatic Intercourse and Immunities in 1961. The Department of State's instructions to the United States delegation at that Conference expressed the following understanding of the exception:

> Although states have generally accorded complete immunity to diplomatic agents from criminal jurisdiction, there has been a reluctance in some countries to accord complete immunity from civil jurisdiction particularly where diplomats engage in commercial or professional activities which are unrelated to their official functions. *While American diplomatic officers are forbidden to engage in such activities in the country of their assignment, other states have not all been so inclined to restrict the activities of their diplomatic agents.* Subparagraph (c) of paragraph 1 would enable persons in the receiving State who have professional and business dealings of a non-diplomatic character with a diplomatic agent to have the same recourse against him in the courts as they would have against a non-diplomatic person engaging in similar activities.

Exemption From Judicial Process, 7 Dig. of Int'l L. 406 (1970) (emphasis added). The United States' contemporaneous view thus interpreted the commercial-activities exception to focus on the kind of for-profit activity in which diplomats should not be engaging while serving as a diplomatic agent of the sending State.

During the debate at the Diplomatic Conference, the delegate from Colombia proposed what would become Article 42 of the Vienna Convention, which as noted above provides that "[a] diplomatic agent shall not in the receiving State practice for personal profit any professional or commercial activity." 23 U.S.T. at 3247; see 1 U.N. Conference on Diplomatic Intercourse and Immunities: Official Records 211-13 (1962), U.N. Doc. A. CONF.20/14. The Conference delegates saw Article 31(1)(c)'s commercial-activities exception and Article 42's ban on commercial activities as closely intertwined. The delegates from Colombia and Italy even proposed deleting the commercial-activities exception in Article 31(1)(c) as unnecessary in view of the prohibition in Article 42. The Conference voted, however, to retain the exception because, among other reasons, there could be no assurance that diplomatic agents would not engage in prohibited activities. See *id*. at 19-21.

Because Articles 42 and 31(1)(c) are so closely tethered to each other, U.S. government officials "have consistently interpreted the [commercial-activities exception] narrowly, advising Congress during its consideration of the Vienna Convention in 1965 and passage of the Diplomatic Relations Act in 1978 that the 'commercial activity' exception was 'minor' and 'probably meaningless' because it merely exposed diplomats to litigation based upon activity expressly prohibited in Article 42." *Tabion v. Mufti*, 73 F.3d 535, 538 n.6 (4th Cir. 1996)

(emphasis added); see Diplomatic Immunity: Hearings on S. 476, S. 477, S. 478, S. 1256, S. 1257 and H.R. 7819 Before the Subcomm. on Citizens and S'holders Rights and Remedies of the S. Comm. on the Judiciary, 95th Cong. 32 (1978) (statement of Bruno Ristau, Chief, Foreign Litigation Unit, U.S. Dep't of Justice) ("The [commercial-activities] exception * * * is probably meaningless, because another provision of the convention, article 42, prohibits them from carrying on any commercial activity for personal profit while they are diplomatic agents."). Here again, as with every stage of the negotiating and drafting history, the discussion of the commercial-activities exception involved the specific question of a diplomat who engages in professional or commercial activities for profit while serving as a diplomat. This Court should not adopt an interpretation of the commercial-activities exception that is "contrary to the drafting history." *Swarna*, 622 F.3d at 137 (examining the drafting history to interpret Vienna Convention Article 39).

4. As described above, the primary purpose of diplomatic immunity under the Vienna Convention "is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions." 23 U.S.T. at 3230 (pmbl.). That purpose dovetails with the purpose of Article 31(1)(c), which lifts immunity against a diplomat whose conduct does not comply with Article 42 in violation of his duty to serve as an agent of the sending State rather than as an individual pursuing personal profit. The efficient performance of a diplomatic mission's functions could be undermined if a diplomat who has acted consistently with Article 42 nonetheless may be sued for conduct that predates the individual's status as a diplomatic agent. The purpose of diplomatic immunity thus supports what the text, context, and history of the Vienna Convention make clear: The commercial-activities exception does not allow suit against a diplomat based on alleged conduct predating the individual obtaining diplomatic status.

B. Benomar's alleged conduct occurred before he obtained status-based immunity

According to the record in this case, the Moroccan Permanent Mission to the United Nations notified the U.S. Mission to the United Nations on September 21, 2018 that Benomar enjoys the title of Minister Plenipotentiary entitled to the privileges and immunities of diplomats under Article 31(1) of the Vienna Convention. … The State Department thereafter recognized his diplomatic status and issued him appropriate credentials. And the State Department's certification of an individual as a diplomat "is conclusive evidence as to the diplomatic status of [the] individual." *United States v. Al-Hamdi*, 356 F.3d 564, 573 (4th Cir. 2004); *e.g.*, *Abdulaziz*, 741 F.2d at 1329, 1331 (noting that "courts have generally accepted as conclusive the views of the State Department as to the fact of diplomatic status," and that "once the United States Department of State has regularly certified a visitor to this country as having diplomatic status, the courts are bound to accept that determination"); *In re Baiz*, 135 U.S. 403, 421 (1890) (noting that "the certificate of the secretary of state * * * is the best evidence to prove the diplomatic character of a person"). Benomar is therefore entitled under Article 31 of the Vienna Convention to status-based immunity from the civil jurisdiction of U.S. courts, unless an exception applies.

The commercial-activities exception to immunity does not apply because none of the alleged conduct in the operative complaint (or the proposed amended complaint) occurred after September 21, 2018—the earliest date on which Benomar could have received status-based immunity. The complaint asserts in passing that Benomar's activities "continu[ed]" to the present. But such conclusory allegations plainly fail to demonstrate with specificity that this action relates to any outside professional or commercial activity Benomar engaged in after September 21. *E.g.*, *Gomes v. ANGOP, Angl. Press Agency*, No. 11-0580, 2012 WL 3637453, at

*9 (E.D.N.Y. Aug. 22, 2012) (rejecting "wholly conclusory" allegation that a diplomat engaged in money laundering sufficient to trigger Article 31(1)'s commercial-activities exception); *Virtual Countries, Inc. v. Republic of South Africa*, 300 F.3d 230, 241 (2d Cir. 2002) ("bald assertions" insufficient to defeat a motion to dismiss against a foreign sovereign based on immunity).

Moreover, it does not matter that Benomar claimed to be immune because of his purported diplomatic status during the time period in which, according to the complaint, he allegedly engaged in wrongdoing. And although Benomar was recognized by the United Nations and the State Department in August 2018 as a "Special Advisor" at the Moroccan Permanent Mission to the United Nations that entitled him to some privileges and immunities apart from the Vienna Convention, he did not have status as a diplomatic agent. As plaintiffs stressed throughout this litigation, U.S. recognition is conclusive, but the United States did not recognize Benomar's diplomatic-agent status until September 21, 2018 at the earliest. No person or government may "unilaterally assert diplomatic immunity." *United States v. Lumumba*, 741 F.2d 12, 15 (2d Cir. 1984); see *United States v. Kuznetsov*, 442 F. Supp. 2d 102, 106 (S.D.N.Y. 2006) (rejecting the defendant's argument that he qualified as a diplomatic agent because the United States did not recognize him as such). Because Benomar did not have recognized diplomatic status during the period when the alleged conduct occurred, the commercial-activities exception cannot apply.

C. Other factors may be relevant to whether the operative complaint alleges conduct sufficient to satisfy the commercial-activities exception

The commercial-activities exception is inapplicable here because the alleged conduct predated Benomar's status as a recognized diplomat. Accordingly, this Court need not address whether the same conduct would constitute a "commercial activity" if an individual engaged in it while serving as a recognized diplomat. Nonetheless, in light of the Court's invitation, the United States provides the following views on that question.

1. The commercial-activities exception "relates only to trade or business activity engaged in for personal profit." *Tabion*, 73 F.3d at 537. Put differently, "diplomats are engaged in 'professional or commercial' activity within the meaning of the [Vienna] Convention when they engage in a business, trade or profession for profit." U.S. Statement of Interest, supra, at 14…

Plaintiffs do not dispute that conduct must be engaged in for the diplomat's profit to qualify for the commercial-activities exception. But the district court found that plaintiffs offered only "bald allegations that Benomar participated in (and was paid millions of dollars for) participating in the scheme to illegally hack plaintiffs' computers and distribute the results to the press." In the absence of any actual evidence that Qatar paid Benomar, the court found that "plaintiffs have not established by a preponderance of the evidence that Benomar was involved in the activity or did it for money."

Record evidence is consistent with those findings. Benomar stated under penalty of perjury that he "do[es] not engage in any systematic trade or business activity within the United States." He also declared under penalty of perjury that he has "received no remuneration from the state of Qatar for [his] foreign policy advice regarding the resolution of the conflict with its neighbours." Even absent that evidence, however, plaintiffs failed to demonstrate by a preponderance of the evidence that Benomar engaged in any professional or commercial activity for profit. As the district court explained, "[t]he only evidence [plaintiffs] provided was a few lines of a deposition transcript in which Joseph Allaham states he is owed $5- to $10 million by Qatar and was thinking of suing Benomar over it because he could not get a straight answer

about it." "[T]his inscrutable excerpt does not show that Benomar was paid anything, let alone that he was paid for participating in the hacking conspiracy, or even that Allaham was; nor does it show that Benomar was paid or agreed to pay anyone." …

2. Had the plaintiffs shown that Benomar was paid for the conduct alleged in the complaint, it is still not clear that the commercial-activities exception would apply to the factual allegations in this case. As explained above, the Court need not address that question here. If it does, the United States respectfully suggests considering the following points.

First, even if a defendant is paid for his conduct, that circumstance does not by itself compel the conclusion that the activity is professional or commercial; for-profit conduct is a necessary but not sufficient element of the commercial-activities exception. A critical factor in this analysis is the nature of the activities and whether those activities are "continuous" and involve "a business, trade or profession for profit." U.S. Statement of Interest, supra, at 9, 14, 20 (emphasis added).

Second, there are circumstances, particularly at a country's mission to international organizations, in which members of different missions collaborate closely to advance a shared objective. A member of one mission might, as part of his official functions, advise another State on how to advance that State's objectives, including by providing technical or other assistance. The United States would have significant concerns if a foreign State permitted a civil case against a U.S. diplomat serving at a U.S. Embassy to proceed for acts taken on behalf of the United States merely because another State benefited from or was involved in those acts. And that would be true irrespective of whether the foreign State agreed with the appropriateness of the conduct. The presence or absence of diplomatic immunity does not turn on "the propriety of [a sovereign's] political conduct, with the attendant risks of embarrassment at the highest diplomatic levels." *Heaney v. Government of Spain*, 445 F.2d 501, 504 (2d Cir. 1971).

Assuming, contrary to this record, that Benomar had been a diplomatic agent since 2017, Benomar has indicated that any actions he took on behalf of a different State were done with, at a minimum, Morocco's acquiescence. Although Morocco has not provided a statement as to whether Benomar's alleged actions were performed in the course of his official functions, Benomar has indicated that his conduct fell within his diplomatic responsibilities. Benomar declared that he provided "foreign policy advice to a number of regional actors, including Qatar, regarding how best to achieve a peaceful resolution to these conflicts and the steps [he] believed were necessary not only to resolve the blockade and bring an end to the war in Yemen, but, more generally, how to reconcile differences among the states so that the region might enjoy a greater measure of stability and harmony." Benomar also stated that he "maintained contact with all the main Yemeni political actors and advised a number of regional and international actors, at their request, and in close consultation and cooperation with the government of Morocco." *Id.* (emphasis added). And he declared that his "communications to and with representatives of Qatar are consistent with [his] diplomatic responsibilities to Morocco," and "are intended to further the interests of Morocco."

Third, even seemingly commercial activity may be diplomatic when it is done at the behest of the sending State. There are circumstances in which "there may sometimes be difficulties in determining the limits of diplomatic functions and the boundaries between diplomatic and commercial" functions. *Denza*, supra, at 254. But "[a] diplomat who is instructed to undertake an activity, such as export promotion or assistance to businessmen, which could be argued to be commercial, * * * is acting within his official functions and should be entitled without question to personal diplomatic immunity." *Id.*

The United States offers this discussion so that the Court has a more complete picture of the narrow scope of the commercial-activities exception even though applying these general principles to an individual who was not recognized by the United States as a diplomat is difficult because the principles all contemplate that the alleged tortfeasor engaged in the acts as a diplomat. If the Court were to address these issues, it should make clear that, regardless of how it rules in this particular case, "professional or commercial activity" under Article 31(1)(c) should be interpreted narrowly and "official functions" should be interpreted broadly so that even arguably professional or commercial activity does not subject a defendant to suit where the defendant engaged in the conduct at the instruction of the sending State.

II. This Court need not address the appropriate allocation of the burden of proof for asserting an exception to diplomatic immunity, but if it does address the issue it should rule that the plaintiff carries the burden

This Court also need not address who bears the burden to prove jurisdiction in a case involving diplomatic immunity from suit. The commercial-activities exception has no bearing where, as here, the conduct occurred before the diplomat obtained immunity. Alternatively, plaintiffs' threadbare allegations about Benomar engaging in any activity for profit could not satisfy any burden to establish an exception based on commercial activities. Against that backdrop, regardless of who carries the burden of production and persuasion, Benomar is entitled to immunity.

If this Court were to address the issue, however, it should hold that once a diplomat's status is demonstrated, a plaintiff in a suit against a diplomat carries the burden to establish subject-matter jurisdiction by establishing, through a preponderance of the evidence, that an exception to immunity applies. *E.g.*, *Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76, 84 (2d Cir. 2001) (adopting a similar standard on a motion to dismiss for lack of subject-matter jurisdiction on the basis of sovereign immunity); see also S. Rep. No. 95-958, at 5 (1978) (noting that a prior version of the bill that would be enacted as the Diplomatic Relations Act of 1978 had been revised because that version "might be read to impose on the courts a new special motion procedure in immunity cases"). Under the ordinary standard for subject-matter jurisdiction, "when the question to be considered is one involving the jurisdiction of a federal court, jurisdiction must be shown affirmatively, and that showing is not made by drawing from the pleadings inferences favorable to the party asserting it." *Shipping Fin. Servs. Corp. v. Drakos*, 140 F.3d 129, 131 (2d Cir. 1998).

Plaintiffs have urged this Court to adopt a burden-shifting framework borrowed from cases interpreting and applying the FSIA, which governs the jurisdiction of courts in suits brought against foreign states and their agencies and instrumentalities. Several courts have held that, "[o]nce the defendant presents a prima facie case that it is a foreign sovereign, the plaintiff has the burden of going forward with evidence showing that, under exceptions to the FSIA, immunity should not be granted, although the ultimate burden of persuasion remains with the alleged foreign sovereign." *Cargill Int'l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1016 (2d Cir. 1993) (emphasis added; citation omitted); *e.g.*, *Virtual Countries*, 300 F.3d at 241; *Phoenix Consulting Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000); *Forsythe v. Saudi Arabian Airlines Corp.*, 885 F.2d 285, 289 n.6 (5th Cir. 1989) (per curiam). That view about the burden of persuasion appears to have been derived from the FSIA's legislative history, which mistakenly described sovereign immunity as an affirmative defense that must be established by the defendant. See H.R. Rep. No. 94-1487, at 17 (1976) (noting that, because "sovereign immunity is an affirmative defense which must be specially pleaded," "the burden will remain on

the foreign state to produce evidence in support of its claim of immunity); *id*. ("Once the foreign state has produced such prima facie evidence of immunity, the burden of going forward would shift to the plaintiff to produce evidence establishing that the foreign state is not entitled to immunity. The ultimate burden of proving immunity would rest with the foreign state.").

That snippet of legislative history is inconsistent with the text of the FSIA. "Under the Act, a foreign state is presumptively immune from the jurisdiction of United States courts." *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993). Because "subject-matter jurisdiction turns on the existence of an exception to foreign sovereign immunity," even if "the foreign state does not enter an appearance to assert an immunity defense, a district court still must determine that immunity is unavailable under the Act." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 n.20 (1983); see also *Rubin v. The Islamic Republic of Iran*, 637 F.3d 783, 799 n.15 (7th Cir. 2011) ("the House Report got this point wrong"); *Frolova v. U.S.S.R.*, 761 F.2d 370, 373 (7th Cir. 1985) (per curiam) (characterizing the legislative history's description of sovereign immunity as an affirmative defense as "not entirely accurate"); cf. *Walters v. Industrial & Commercial Bank of China, Ltd*., 651 F.3d 280, 293 (2d Cir. 2011) (acknowledging that whether "sovereign immunity is an affirmative defense * * * is debatable"). And if foreign sovereign immunity is not an affirmative defense, there is no reason to "rest" the "ultimate burden of proving immunity" with the "foreign state."

This Court need not address the issue of burden of proof in this case. Regardless of which standard the Court applies, Benomar is entitled to immunity because the commercial-activities exception does not apply to conduct that predates service as a diplomat or, alternatively, plaintiffs' "bald assertions" of remuneration are "not sufficient to defeat the motion to dismiss" even under the FSIA standard. *Virtual Countries*, 300 F.3d at 241. If the Court were to address which party carries the burden to establish immunity, however, the United States respectfully requests that the Court should not transplant the errant statement in some FSIA cases concluding that the foreign state carries the ultimate burden of proving immunity into this context; instead, the Court should hold that once the defendant has established that he is presumptively entitled to diplomatic immunity, the plaintiff has the burden to establish by a preponderance of the evidence that an exception to immunity applies. The diplomat does not have any ultimate burden of persuasion.

III. This Court's precedents addressing sovereign immunity provide useful guidance as to the preliminary showing required for allowing jurisdictional discovery

The United States takes no position on whether the district court abused its discretion when it denied plaintiffs jurisdictional discovery to establish an exception to immunity. We briefly note, however, that concerns that have led this Court to take a circumspect approach to allowing jurisdictional discovery in cases addressing foreign sovereign immunity apply with even greater force to cases involving diplomatic immunity.

In *Arch Trading Corp. v. Republic of Ecuador*, 839 F.3d 193 (2d Cir. 2016), the Court upheld the district court's denial of jurisdictional discovery in an FSIA case involving a lawsuit against two of Ecuador's instrumentalities. The Court explained that sovereign immunity is immunity from "the expense, intrusiveness, and hassle of litigation." *Id*. at 206; *e.g.*, *Phoenix Consulting*, 216 F.3d at 40 ("In order to avoid burdening a sovereign that proves to be immune from suit * * * jurisdictional discovery should be carefully controlled and limited."); *Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. 134, 146 n.6 (2014) (noting "comity interests and the burden that the discovery might cause to the foreign state" as factors for a court to consider when addressing discovery requests against a foreign sovereign). In light of the need for immunity to

protect against the burdens of litigation, "a district court may deny jurisdictional discovery demands made on a foreign sovereign if the party seeking discovery cannot articulate a 'reasonable basis' for the court first to assume jurisdiction." *Arch Trading*, 839 F.3d at 206-07.

This Court has also recognized in the context of litigation brought under the FSIA that plaintiffs should be able to "specify * * * what discovery they might seek," and jurisdictional discovery must extend no further than to "verify allegations of specific facts crucial to an immunity determination." *Arch Trading*, 839 F.3d at 207. A plaintiff who offers only "conclusory" allegations cannot obtain jurisdictional discovery, because "[t]he FSIA protects defendants from a fishing expedition." *Id*. That principle also applies when conduct involves allegations among defendants and others, precluding speculative requests to "examine the details of the relationships" between defendants and others identified in a complaint. *Id*.; see *id*. at 207-08 (noting "the distinction between activities of defendants and of the entities alleged to be conducting commercial activity in the United States").

Like a foreign state under the FSIA, diplomatic agents are "presumptively entitled to immunity" under the Vienna Convention and "to dismissal" under the Diplomatic Relations Act and should be shielded against the expense, intrusiveness, and hassle of litigation. *Devi v. Silva*, 861 F. Supp. 2d 135, 141 (S.D.N.Y. 2012). To guard against the dilution of that principle, this Court has recognized in the FSIA context that district courts must "be 'circumspect' in allowing discovery before the plaintiff has established that the court has jurisdiction." *Arch Trading*, 839 F.3d at 206. Indeed, those concerns carry even greater force in cases against diplomatic agents, where the exceptions to immunity are even narrower than the exceptions to foreign sovereign immunity in the FSIA and where litigation has the potential to implicate principles of diplomatic inviolability and other protections afforded to diplomats under the Vienna Convention.

IV. A district court should be allowed to consider immunity from suit as a factor when deciding whether to grant leave to amend

The district court stated that plaintiffs "have not claimed to have any evidence not already available to them," and "plaintiffs have not suggested that they are in possession of facts that would cure the deficiencies" the court identified. Based on those circumstances, the court ruled that allowing plaintiffs to file an amended complaint would be futile because "the problem here is not a pleading deficiency that plaintiffs can fix," but rather "an absence of evidence."

The United States takes no position addressing whether the district court abused its "broad discretion" when it denied plaintiffs' leave to amend. *Gurary v. Winehouse*, 235 F.3d 792, 801 (2d Cir. 2000). But the United States respectfully states that, even if it is not absolutely clear that "amendment would be futile," *Tocker v. Philip Morris Cos.*, 470 F.3d 481, 491 (2d Cir. 2006), a diplomat's potential immunity from suit may properly inform a district court's analysis of whether leave to amend should be granted based on potential prejudice to the defendant, see *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 200 (2d Cir. 2007) (noting "undue prejudice to the opposing party" as a proper basis to deny leave to amend). Allowing leave despite likely futility could threaten the diplomat's immunity from suit by imposing on the diplomat the burden of defending against a suit that has already been found to be deficient.

* * * *

On December 6, 2019, the Court of Appeals for the Second Circuit issued its decision in *Broidy*, finding Benomar immune from the suit. *Broidy Capital Management*

LLC & Elliott Broidy v. Jamal Benomar, 944 F.3d 436 (2d Cir. 2019). The decision is excerpted below.

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* * * *

…[W]here a defendant has demonstrated diplomatic status, we hold that plaintiffs bear the burden of proving by a preponderance of the evidence that an exception to diplomatic immunity applies and that jurisdiction therefore exists.

* * * *

D. The commercial activity exception to diplomatic immunity does not apply to plaintiffs' claims

We next turn to the question of whether plaintiffs met their burden of establishing that an exception to diplomatic immunity applies. Plaintiffs claim that their suit can proceed pursuant to the commercial activity exception to diplomatic immunity, which permits a diplomat to be sued in "[a]n action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions." VCDR art. 31(1)(c). While the precise contours of the phrase "professional or commercial activity," which is not defined in the VCDR, are unsettled, it is broadly understood to refer to trade or business activity engaged in for personal profit. *See Tabion v. Mufti*, 73 F.3d 535, 537 (4th Cir. 1996). Plaintiffs contend that Benomar engaged in commercial activity because of his alleged for-profit work on the hack and smear campaign in late 2017 and early 2018. The United States argues as amicus that the complaint fails even to allege application of the commercial activity exception because it alleges only conduct occurring before Benomar obtained status-based immunity, and, in the United States' view, the commercial activity exception does not apply to conduct before the diplomat obtained status-based immunity. However, we need not reach the question of when activity must occur to qualify for the commercial activity exception or what type of activity qualifies because it is clear from the record that plaintiffs failed to meet their burden of proving by a preponderance of the evidence that Benomar at any time engaged in the alleged smear campaign.

* * * *

Reviewing this evidence, the district court rightly concluded that plaintiffs had failed to meet their burden of proving by a preponderance of the evidence that Benomar had engaged in commercial or professional activity. Plaintiffs submitted no evidence whatsoever that Benomar was engaged in the activity or received the payments alleged, only a snippet of a deposition transcript that, viewed in the context of the additional transcript pages submitted by Benomar, is both unpersuasive and misleadingly out of context. As plaintiffs failed to establish that the commercial activity exception to diplomatic immunity applied, we find that Benomar is entitled to diplomatic immunity under the terms of the Vienna Convention, and plaintiffs' claims against him were properly dismissed for lack of subject matter jurisdiction.

II. The district court did not abuse its discretion in denying jurisdictional discovery

Plaintiffs also argue that the district court erred in denying their request for jurisdictional discovery. …

Plaintiffs' arguments ignore the fact that the district court offered plaintiffs an opportunity to make specific jurisdictional discovery requests, and plaintiffs failed to do so. …

Further, contrary to plaintiffs' contentions otherwise, it was appropriate for the district court to balance the need for jurisdictional discovery with the risk of imposing discovery obligations on a diplomat who in fact possesses immunity from the court's jurisdiction—and, moreover, who generally "is not obliged to give evidence as a witness" under the VCDR. VCDR art. 31(2). Like sovereign immunity, diplomatic immunity protects the diplomatic mission "from the expense, intrusiveness, and hassle of litigation." *Arch Trading*, 839 F.3d at 206. Achieving this goal requires that "a court must be circumspect in allowing discovery before the plaintiff has established that the court has jurisdiction." *Id.*

In the FSIA context, this Court has described discovery as "warranted only to verify allegations of specific facts crucial to an immunity determination" and inappropriate where "plaintiffs do not yet know what they expect to find from discovery" and advance only broad demands for discovery of the kind plaintiffs advanced in their opposition to the motion to dismiss. *Id.* at 207 (affirming denial of jurisdictional discovery where "plaintiffs did not specify … what discovery they might seek").

Accordingly, the district court did not abuse its discretion in denying plaintiffs jurisdictional discovery.

III. The district court did not abuse its discretion in denying leave to amend the complaint

Finally, plaintiffs argue that the district court abused its discretion in denying leave to amend their complaint. …

Here, permitting plaintiffs to amend their complaint as requested would have been futile. …Therefore, as the proposed amendments would not enable plaintiffs to establish jurisdiction and would not affect the proper dismissal of the complaint, the district court did not abuse its discretion in denying plaintiffs leave to amend.

* * * *

b. Muthana v. Pompeo

On April 26, 2019, the United States filed its brief in support of its motion to dismiss or, in the alternative, for summary judgment in the civil action brought by the father of Hoda Muthana. *Muthana v. Pompeo*, No. 19-cv-00445 (D.D.C.). Hoda Muthana was born in the United States while her father, a former Yemeni diplomat to the UN, had diplomatic-agent-level immunity under the Vienna Convention on Diplomatic Relations ("VCDR"), because the United States was not notified that Plaintiff's diplomatic status had been terminated until more than three months after Muthana's birth. Muthana was granted a passport in error. Muthana traveled to Syria to join ISIS in November 2014. The United States revoked Muthana's passport in January 2016.

Her father's suit seeks injunctive relief barring the United States from rescinding Muthana's (or her minor child's) purported U.S. citizenship; a declaratory judgment that the United States violated Muthana's due process rights; a writ of mandamus requiring the United States to aid in the return of Muthana and her minor child to the United

States; and a declaratory judgment that Plaintiff would not violate 18 U.S.C. § 2339B—which makes it a crime to provide material support or resources to designated foreign terrorist organizations—if he were to provide financial assistance to Muthana (Count 9).

On May 17, 2019, the United States filed a reply brief in support of dismissal or summary judgment. On December 9, 2019, the court granted summary judgment on counts one through eight and dismissal of count nine. Excerpts follow from the opening brief of the United States. The opening brief, reply brief, and court opinion are available at https://www.state.gov/digest-of-united-states-practice-in-international-law/.

* * * *

Plaintiff's next-friend claims, Counts 1 through 8, all rest on a fundamental and dispositive error—the assertion that Muthana is a U.S. citizen. She is not and never was a U.S. citizen. Muthana's parents enjoyed diplomatic-agent-level immunity at that time of her birth, meaning that she was born not subject to the jurisdiction of the United States and thus could not and did not acquire U.S. citizenship at birth. And because A.M.'s only claim to citizenship rests on his mother (Muthana) being a U.S. citizen, the claims related to A.M. must also be dismissed.

In particular, and as explained below, the Court should dismiss Counts 1 through 8 for failure to state a claim because the allegations in the complaint and the exhibits to the complaint, if taken as true, fail to establish that Muthana is a U.S. citizen. If the Court believes that it cannot conclude that Muthana is not a U.S. citizen solely on the basis of the complaint and exhibits, and believes that it cannot rely on the relevant government records on a motion to dismiss, Defendants move in the alternative for summary judgment on these claims based on the undisputed facts and the attached Department of State certification and contemporaneous underlying official records.

a) The Allegations in the Complaint and Exhibits to the Complaint Fail to Establish that Muthana Is a U.S. Citizen—So All of Plaintiff's Next-Friend Claims Fail

The Fourteenth Amendment to the U.S. Constitution confers citizenship on persons "born or naturalized in the United States, *and subject to the jurisdiction thereof*." U.S. Const. amend. XIV, § 1 (emphasis added); *see also* 8 U.S.C. § 1401(a). The Supreme Court has long held that the phrase "subject to the jurisdiction thereof" excludes from the coverage of the Fourteenth Amendment's citizenship clause children born in the United States to foreign ministers or diplomatic officers representing foreign nations. *Wong Kim Ark*, 169 U.S. at 693 ("The Fourteenth Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory … with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers …."); *Nikoi v. Attorney Gen.*, 939 F.2d 1065, 1066 (D.C. Cir. 1991) ("Because one parent was a foreign official with diplomatic immunity when each child was born, the birth did not confer United States citizenship.").

It is critical to Plaintiff's next-friend claims that Plaintiff enjoyed diplomatic-agent-level immunity when Muthana was born. As explained above, the Vienna Convention governs that issue. Article 10 of the Convention requires a sending State to notify the receiving State of "[t]he appointment of members of the mission [and] their arrival." Vienna Convention, art. 10(1)(a). When someone is appointed to a permanent mission to the United Nations, the individual's sending State must first notify the United Nations Office of Protocol. Declaration of James B.

Donovan (Mar. 3, 2019) ¶ 3 (attached hereto as Exhibit A). Once the United Nations Office of Protocol accepts the accreditation of the individual, it notifies USUN and requests that the United States afford the individual the appropriate privileges and immunities. *Id.* ¶ 4. Article 39 of the Convention states that "[e]very person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State on proceeding to take up his post or, if already in its territory, from the moment when his appointment is notified to the Ministry for Foreign Affairs or such other ministry as may be agreed." Vienna Convention, art. 39(1). Article 37, in turn, extends the privileges and immunities specified in Articles 29 to 36 to "members of the family of a diplomatic agent forming part of his household." *Id.* art. 37(2).

In like manner, Article 10 of the Vienna Convention requires a sending State to notify the receiving State of the "final departure or the termination of [members'] functions with the mission." Vienna Convention, art. 10(1)(a). When someone serving in a permanent mission to the United Nations is terminated, the individual's sending State must first notify the United Nations Office of Protocol. Donovan Decl. ¶ 9. Once the United Nations Office of Protocol receives a notice of termination of the individual, it notifies USUN. *Id.* Article 43 of the Convention, in turn, specifies that "[t]he function of a diplomatic agent comes to an end … on *notification by the sending State to the receiving State that the function of the diplomatic agent has come to an end*." Vienna Convention, art. 43(a) (emphasis added). Notification from the sending State is the normal method for establishing the date that immunity ends. *See Raya v. Clinton*, 703 F. Supp. 2d 569, 578 (W.D. Va. 2010) ("[T]he Vienna Convention requires sending countries to provide formal notice of a diplomatic agent's appointment and termination, and specifically states that an agent's diplomatic functions come to an end on notification of termination by the sending country."). If the United States receives a timely notification of termination, immunity then subsists for a reasonable period after the termination date as notified by the foreign government so that the foreign mission member has a reasonable time to depart, unless it is a late notice received more than 30 days after the date of termination. Vienna Convention, art. 39(2) ("When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so … ."). That is, if the United States had been properly notified on August 25, 1994, that Plaintiff's termination date was September 1, 1994, he and his family would have continued to enjoy diplomatic-agent-level privileges and immunities until October 1, 1994. But when the notice of termination is received more than 30 days after the date of termination, the immunities cease on the date of notification. *See id.*, art. 9(2) ("If the sending State refuses or fails within a reasonable period to carry out its obligations under paragraph 1 of this Article, the receiving State may refuse to recognize the person concerned as a member of the mission."); 43(b) ("[t]he function of a diplomatic agent comes to an end … on notification by the receiving State to the sending State that, in accordance with paragraph 2 of Article 9, it refuses to recognize the diplomatic agent as a member of the mission.").

Under these principles, Plaintiff's Counts 1 through 8 must be dismissed because the undisputed facts establish that Muthana did not acquire U.S. citizenship at birth. Plaintiff alleges that he was terminated from his diplomatic position with the Yemeni Mission to the United States "no later than September 1, 1994." Compl. ¶ 42. It is undisputed that USUN was not formally notified of his termination, however, until February 6, 1995. *Id.*, Ex. D. Thus, under the plain terms of the Vienna Convention, and consistent with the practice of the United States regarding individuals accredited to permanent missions to the United Nations, Plaintiff's

diplomatic status ceased on February 6, 1995—the date the receiving State (the United States, through USUN) received notice of his termination. *See* Vienna Convention, art. 43 ("The function of a diplomatic agent comes to an end … on notification by the sending State to the receiving State that the function of the diplomatic agent has come to an end"). In the meantime, Muthana was born in New Jersey on [redacted] 1994. Compl. ¶ 20.

Because USUN did not receive timely notification of Plaintiff's termination, the Department of State afforded Plaintiff's family, including Muthana, immunity through the date of notification, February 6, 1995. When Muthana was born in New Jersey on [redacted] 1994, she enjoyed diplomatic-agent-level immunity through her father and, therefore, was born not "subject to the jurisdiction" of the United States and did not acquire U.S. citizenship at birth. *Wong Kim Ark*, 169 U.S. at 693 ("[t]he Fourteenth Amendment affirms the … rule of citizenship by birth within the territory … with the exceptions or qualifications … of children of foreign sovereigns or their ministers"). Because Plaintiff's next-friend claims all rely on Muthana's purported acquisition of U.S. citizenship at birth, they all necessarily fail.

This conclusion makes good sense. Relying on the date of notification of termination, which both accords with the plain language of the Vienna Convention and reflects U.S. practice regarding members of UN permanent missions and foreign missions to the United States, is critical to our foreign relations. The Supreme Court has emphasized the overriding importance of "the concept of reciprocity that governs much of international law" on diplomatic privileges and immunities, as well as other strong reasons "to protect foreign diplomats in this country":

> Doing so ensures that similar protections will be accorded those that we send abroad to represent the United States, and thus serves our national interest in protecting our own citizens. Recent history is replete with attempts, some unfortunately successful, to harass and harm our ambassadors and other diplomatic officials. These underlying purposes combine to make our national interest in protecting diplomatic personnel powerful indeed.

Boos v. Barry, 485 U.S. 312, 323–24 (1988). By relying on the date of notification of termination, the United States preserves foreign governments' control over when their emissaries' functions and immunity ends, absent notice from the receiving State that ends such recognition under Article 43(b) (normally for bad acts by a member of a foreign mission resulting in expulsion). This approach—of giving primacy to notice of termination by the sending State—is critical to preserving the United States' own ability to control when the immunities granted to our own diplomats serving overseas end. For example, the United States would not want a foreign State to determine—without formal notification from the United States—that one of our mission members is no longer employed by the Embassy or to commence a criminal prosecution based on the foreign State's own determination of employment (or not) by the United States. *See* Vienna Convention, preamble ("the purpose of such privileges and immunities is … to ensure the efficient performance of the functions of diplomatic missions as representing State"). Relying on the date of notification to determine when diplomatic immunity ends avoids second-guessing and gives the States— through this notice process—control over when diplomatic immunity begins and ends. Under the principles of reciprocity that govern foreign relations, this rule is of paramount importance to the safety and security of U.S. diplomats abroad.

Plaintiff maintains that the date of termination of a diplomatic position—rather than the date of notification of termination—governs diplomatic status. Compl. ¶ 42. As just explained, the law provides otherwise. A foreign diplomat enjoys immunity from the time the receiving State confers such immunity until the time the receiving State terminates it, and, consistent with the Department of State's routine and usual practice, Plaintiff's diplomatic-agent-level immunity was in effect until USUN received formal notice of his termination from the U.N. Office of Protocol on February 6, 1994. None of Plaintiffs' arguments to the contrary has merit.

First, at the March 4, 2019 hearing on Plaintiff's request for expedited consideration of the complaint, Plaintiff argued that a sending State could misuse the process afforded parties to the Vienna Convention, under which diplomatic immunity ends upon notification to the receiving State, and that the Court should therefore accept Plaintiff's position that diplomatic immunity ends upon termination. Mar. 4, 2019 Hearing Transcript at 33:25–34:7 (positing that a sending State "could discharge one of the members of their diplomat part[y] and send that person out to commit acts of espionage and sabotage fully cloaked with the deniability that they're being done on behalf of the country because we discharged them; but with the full knowledge that that person would be able to operate with absolute impunity from the law because they didn't send a notification").

Plaintiff's argument—which is predicated on a signatory purposefully and intentionally violating the Vienna Convention—directly conflicts with the terms of the Vienna Convention and is wildly implausible. The Vienna Convention directs that "[t]he function of a diplomatic agent comes to an end … *on notification by the sending State to the receiving State* that the function of the diplomatic agent has come to an end." Vienna Convention, art. 43 (emphasis added); *see also id*., art. 43(b) (the function of a diplomatic agent may come to an end "[o]n notification by the receiving State to the sending State that … it refuses to recognize the diplomatic agent as a member of the mission."). So Plaintiff's hypothesized scenario would flout the United States' own negotiated agreement with other counties to rely on the notification of termination. *Logan v. Dupuis*, 990 F. Supp. 26, 29 (D.D.C. 1997) (a "treaty is to be interpreted 'in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.'") (citing the Vienna Convention on the Law of Treaties, art. 31(1), May 23, 1969, 1155 U.N.T.S. 331).

Plaintiff's hypothetical is also incongruent with the reasons a State enters into the Vienna Convention in the first place, *see* Vienna Convention, preamble (that the purpose of the Convention is to "maintain … international peace and security and "promot[e] … friendly relations among nations"), and is contrary to the foundations of international law—comity, mutuality, and reciprocity, *see Hilton v. Guyot*, 159 U.S. 113, 228 (1895) (recognizing the "that international law is founded upon mutuality and reciprocity"); *The Schooner Adeline*, 13 U.S. 244, 285 (recognizing "the principles of international law, comity and reciprocity"). Under the Vienna Convention, a sending State is *required* to provide notice of termination, *see* Vienna Convention, art. 10(1)(a), and a person enjoying privileges and immunities has a duty "to respect the laws and regulations of the receiving State," *id.*, art 41(1). If a signatory is prepared to violate the express terms of the Vienna Convention to abuse a receiving State's grant of diplomatic immunity as posited in Plaintiff's hypothetical, there is no reason to think a sending State would not further violate the Vienna Convention and use *current* members of its diplomatic mission to engage in espionage and other bad acts.

And the gambit that Plaintiff's counsel posits would almost certainly fail. Given that the sending State would be responsible for having failed to provide the notice of termination (in

contravention of the Vienna Convention) and that the "former" diplomat's action would presumably be of benefit to the sending State, it seems highly unlikely that anyone would be fooled by the sending State's chicanery. Moreover, if the receiving State was not aware of the termination—because notice had not been provided—it would be even more likely to attribute the actions of the agent to the sending State. So the sending State would likely suffer the political and diplomatic repercussions of its agent's misconduct regardless. On top of all of this, the hypothetical ignores the authority of the receiving State to terminate diplomatic privileges by providing notice to the sending State if concerns arise regarding an individual in a diplomatic mission. *See* Vienna Convention, art. 43(b).

Indeed, because the Convention expressly provides for notice to the sending State or by the receiving State to terminate diplomatic privileges, this hypothetical concern for abuse provides no basis to depart from these express terms of the Convention. Plaintiff asks the Court to depart from the Convention's plain language and thereby create uncertainty between the United States and signatories to the Vienna Convention. The Court should not do so. *See Tabion*, 73 F.3d at 537 ("Treaties are contracts between sovereigns, and as such, should be construed to give effect to the intent of the signatories."). Plaintiff's position will adversely affect U.S. diplomats abroad and U.S. interests. *See Hellenic Lines, Ltd v. Moore*, 345 F.2d 978, 980 (D.C. Cir. 1965) (purpose of diplomatic immunity is "to 'contribute to the development of friendly relations among nations' and to 'ensure the efficient performance of the functions of diplomatic missions'") (citing the Vienna Convention, preamble). As explained above, the Vienna Convention serves to protect the functions of U.S. diplomatic missions and members of U.S. diplomatic missions, and the United States relies on the date of notification of termination to ensure that the diplomatic immunity of U.S. diplomats is not terminated prematurely and without knowledge of the United States in violation of the Vienna Convention.

Second, in support of Plaintiff's argument that diplomatic-agent-level immunity "last[s] only as long as the diplomatic position itself," Plaintiff points to a 2004 letter by Russell F. Graham, a minister counselor at USUN. *See* Compl., Ex C. Plaintiff alleges that he provided the Department of State with a copy of this letter in support of Muthana's 2005 passport application. Compl. ¶ 21. The letter, however, is not addressed to Plaintiff or to the Department of State, but rather to the Bureau of Citizenship and Immigration Services, *id.*, Ex. C, a component of the Department of Homeland Security that has no role in either passport issuance or the conferral or termination of diplomatic-agent-level immunity. The letter does not state for what purpose it was issued, and it is unclear how Plaintiff obtained the letter.

In any event, the letter notes two dates: Plaintiff's date of appointment, October 15, 1990; and date of termination, September 1, 1994. *Id.* The letter does not purport to state or analyze when the Department of State no longer afforded Plaintiff's diplomatic privileges, nor does it address the question at issue here: namely, what immunities Plaintiff enjoyed between September 1, 1994, and the date USUN was formally notified of Plaintiff's termination, February 6, 1995. The letter does not address Muthana or her birth at all. Rather, the letter states, correctly, that diplomatic privileges and immunities existed during Plaintiff's period of employment and makes no assessment of the period at issue in this suit. The letter, in other words, indicates that Plaintiff enjoyed diplomatic immunity during his period of employment. It does not, however, establish that his immunity ceased prior to the date USUN was notified of his termination.

Third, Plaintiff cites *United States v. Khobragade*, 15 F. Supp. 3d 383 (S.D.N.Y. 2014), and *United States v. Guinand*, 688 F. Supp. 774 (D.D.C. 1988), as support for his claim that the date of termination governs immunity. Compl. ¶ 41. Neither case helps him, however, because

neither case addresses the distinction between the date that a person is terminated and the date that the United States is notified of termination. In *Khobragade*, the defendant was a member of the Indian permanent mission to the United Nations with diplomatic-agent-level immunity who, after being criminally indicted, departed the United States. 15 F. Supp. 3d at 386. The case does not address the legal significance of the termination date and does not hold that diplomatic immunity under the Vienna Convention ends upon termination. *Id.*

Nor does *Guinand* address the date of notification of termination or hold that immunity ceases upon termination rather than notification. It simply states, as a general matter, that U.S. criminal jurisdiction may be exercised "over persons whose status as members of the diplomatic mission has been terminated for acts they committed during the period in which they enjoyed privileges and immunities," *Guinand*, 688 F. Supp. at 775.

The entirety of Plaintiff's next-friend claims rests on a flawed legal position about the time period during which the Department of State afforded Plaintiff diplomatic-agency-level immunity. Under settled law, Muthana was born to a father who enjoyed diplomatic-agent-level immunity at the time of her birth and, therefore, was not born "subject to the jurisdiction" of the United States. As a result, she did not acquire U.S. citizenship at birth. Therefore, the Court should dismiss Counts 1 through 8 for failure to state a claim. *See* Fed. R. Civ. P. 12(b)(6).

b) The Attached Department of State Certification and Underlying Records Confirm that Muthana Did Not Acquire U.S. Citizenship at Birth

If Court believes that it cannot conclude that Muthana is not a U.S. citizen solely on the basis of the complaint and exhibits, and it determines that it cannot rely on the official government records included herewith in addressing the motion to dismiss, the Court should grant summary judgment to Defendants on the issue based on the undisputed facts and the attached Department of State certification and underlying records.

Although there is some question whether Plaintiff was terminated from his diplomatic position in June or in September 1994, any dispute on that point is irrelevant to any issue in this case. Plaintiff and Defendants agree that Plaintiff was terminated "no later than September 1, 1994." Compl. ¶ 42. There is also no dispute that Muthana was born in New Jersey on [redacted] 1994. *Id.* ¶ 20. Finally, Plaintiff does not dispute that USUN was not officially notified of Plaintiff's termination until February 6, 1995. *Id.*, Ex. D.

The attached certification and contemporaneous records from the Department of State confirm that Muthana was born not subject to the jurisdiction of the United States and thus did not acquire U.S. citizenship at birth. The Court can and should grant summary judgment on this basis.

First, the attached Department of State certification—which addresses Plaintiff's diplomatic status at the time of Muthana's birth—conclusively establishes that the Department of State still afforded Plaintiff diplomatic-agent-level immunity at the time of Muthana's birth and that Muthana thus did not acquire U.S. citizenship at birth. Certification of James B. Donovan, Minister-Counselor for Host Country Affairs at USUN (Mar. 1, 2019) (attached hereto as Ex. B). This certification shows: that the United States was not formally notified of Plaintiff's termination from his diplomatic post until February 6, 1995; that the Muthana family continued to enjoy diplomatic-agent-level immunity until that date; and that Muthana therefore was not born "subject to the jurisdiction" of the United States and thus did not acquire U.S. citizenship at birth. Donovan Certification.

Under established law that has been consistent for over a century, when the Department of State certifies the diplomatic status of an individual, "the courts are bound to accept that

determination." *Abdulaziz*, 741 F.2d at 1339. The "certificate of the secretary of state … is the best evidence to prove the diplomatic character of a person." *In re Baiz*, 135 U.S. 403, 421 (1890); *see also United States v. Al-Hamdi*, 356 F.3d 564, 573 (4th Cir. 2004) ("[W]e hold that the State Department's certification, which is based upon a reasonable interpretation of the Vienna Convention, is conclusive evidence as to the diplomatic status of an individual. Thus, we will not review the State Department's factual determination that, at the time of his arrest, Al-Hamdi fell outside the immunities of the Vienna Convention."). Thus, the attached Department of State certification ends the factual inquiry into Plaintiff's diplomatic status at the time of Muthana's birth. *See Abdulaziz*, 741 F.2d at 1331 ("[O]nce the United States Department of State has regularly certified a visitor to this country as having diplomatic status, the courts are bound to accept that determination.").

Second, although the Department of State's certification of Plaintiff's status is dispositive under the law, it is based upon contemporaneous government records that show conclusively that USUN did not receive formal notification of Plaintiff's termination until February 6, 1995. When an individual comes to work at his or her country's permanent mission to the United Nations, the sending State sends a notification of appointment to the United Nations Office of Protocol. Donovan Decl. ¶ 3. After accepting the accreditation, the United Nations Office of Protocol then notifies USUN of the appointment. *Id.* ¶ 4, 5. The United Nations uses the same process to notify USUN of a termination. *Id.* ¶ 12–14.

Contemporaneous records reflecting these processes establish that the United States was not formally notified of Plaintiff's termination until February 6, 1995. As explained in the attached Department of State declaration, at the time of Plaintiff's service at the United Nations, USUN maintained its privileges-and-immunities records in what was known as the KARDEX system. *Id.* ¶ 7–11. Under this system, each accredited diplomat had a paper card reflecting relevant information, including the diplomat's name and place of birth, information about the diplomat's family members, and dates for the beginning and end of the diplomat's privileges and immunities. The KARDEX card for Plaintiff, *id.*, Ex. 1, is clearly annotated to record the termination of his diplomatic-agent-level privileges and immunities as February 6, 1995. *Id.*

Plaintiff's card also reflects an annotation recording the birth of Muthana, with her place and date of birth. *Id.* This annotation is significant because it indicates that USUN, at the time that it received notification of Muthana's birth, had not terminated Plaintiff's privileges and immunities. There would have been no reason to annotate the card to reflect the addition of a new child if Plaintiff was not then enjoying such privileges and immunities. *Id.* ¶ 19. The annotation thus reflects the Department of State's view that Muthana, like her family, enjoyed diplomatic immunity and that she was not born subject to the jurisdiction of the United States. The attached Department of State declaration also explains the importance of relying on the date of notification of termination in determining when diplomatic privileges and immunities end: "We rely on the official notification date because anything short of that, such as reliance on hearsay about the status of a diplomat, could erroneously expose an accredited diplomat to the jurisdiction of the United States, when in fact, under applicable international law, he or she would enjoy immunities." *Id.* ¶ 14.

Nothing in Plaintiff's complaint conflicts with the certification or the underlying contemporaneous government records or raises any potential dispute on a material fact. The complaint alleges that Plaintiff—Muthana's father—served as First Secretary from October 15, 1990, until sometime in 1994. Compl. ¶ 18, 25, 42, Ex. D. This is entirely consistent with the attached certification and underlying records. *See* Donovan Certification; Donovan Declaration

¶ 18, Ex. 2, Ex. 3. The complaint also does not dispute that USUN was not officially notified of Plaintiff's termination until February 6, 1995. Compl. ¶ 21, Ex. D. Again, this is consistent with the attached certification and records. *See* Donovan Certification; Donovan Declaration ¶ 18, Ex. 1, Ex. 2, Ex. 3. Accordingly, when Muthana was born on [redacted] 1994, Compl. ¶ 20, her father enjoyed diplomatic-agency-level immunity because the United Nations had not yet notified USUN of his termination and the Department of State continued to update its records system, KARDEX, showing that the United States still afforded him diplomatic-agency-level immunity. *See* Vienna Convention, art. 43 ("The function of a diplomatic agent comes to an end … on notification by the sending State to the receiving State that the function of the diplomatic agent has come to an end … ."). This in turn meant that Muthana was born with diplomatic-agent-level immunity because she was a member of her father's household. *See* Vienna Convention, art. 37(2) (extending diplomatic immunity to "members of the family of a diplomatic agent forming part of his household").

Under these principles, it is clear that Muthana is not and never was a U.S. citizen—and that none of the relief Plaintiff seeks on her behalf can be granted. Accordingly, Defendants are entitled to summary judgment on Counts 1 through 8 of the complaint.

* * * *

D. INTERNATIONAL ORGANIZATIONS

International Organizations Immunities Act: *Jam v. IFC*

As discussed in *Digest 2018* at 416-28, the United States filed a brief as amicus curiae in the U.S. Supreme Court in a case involving the International Organizations Immunities Act ("IOIA"). *Jam v. Int'l Fin. Corp.*, No. 17-1011. On February 27, 2019, the Supreme Court issued its decision, holding that the IOIA grants international organizations the same immunity from suit as foreign governments enjoy under the FSIA. *Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759 (2019). Excerpts follow from the Court's opinion.

_____

* * * *

The IFC contends that the IOIA grants international organizations the "same immunity" from suit that foreign governments enjoyed in 1945. Petitioners argue that it instead grants international organizations the "same immunity" from suit that foreign governments enjoy today. We think petitioners have the better reading of the statute.

A

The language of the IOIA more naturally lends itself to petitioners' reading. In granting international organizations the "same immunity" from suit "as is enjoyed by foreign governments," the Act seems to continuously link the immunity of international organizations to that of foreign governments, so as to ensure ongoing parity between the two. The statute could otherwise have simply stated that international organizations "shall enjoy absolute immunity

from suit," or specified some other fixed level of immunity. Other provisions of the IOIA, such as the one making the property and assets of international organizations "immune from search," use such noncomparative language to define immunities in a static way. 22 U. S. C. §288a(c). Or the statute could have specified that it was incorporating the law of foreign sovereign immunity as it existed on a particular date. See, *e.g.*, Energy Policy Act of 1992, 30 U. S. C. §242(c)(1) (certain land patents "shall provide for surface use to the same extent as is provided under applicable law prior to October 24, 1992"). Because the IOIA does neither of those things, we think the "same as" formulation is best understood to make international organization immunity and foreign sovereign immunity continuously equivalent.

That reading finds support in other statutes that use similar or identical language to place two groups on equal footing. …

The IFC objects that the IOIA is different because the purpose of international organization immunity is entirely distinct from the purpose of foreign sovereign immunity. Foreign sovereign immunity, the IFC argues, is grounded in the mutual respect of sovereigns and serves the ends of international comity and reciprocity. The purpose of international organization immunity, on the other hand, is to allow such organizations to freely pursue the collective goals of member countries without undue interference from the courts of any one member country. The IFC therefore urges that the IOIA should not be read to tether international organization immunity to changing foreign sovereign immunity.

But that gets the inquiry backward. We ordinarily assume, "absent a clearly expressed legislative intention to the contrary," that "the legislative purpose is expressed by the ordinary meaning of the words used." *American Tobacco Co*. v. *Patterson*, 456 U. S. 63, 68 (1982) (alterations omitted). Whatever the ultimate purpose of international organization immunity may be—the IOIA does not address that question—the immediate purpose of the immunity provision is expressed in language that Congress typically uses to make one thing continuously equivalent to another.

B

The more natural reading of the IOIA is confirmed by a canon of statutory interpretation that was well established when the IOIA was drafted. According to the "reference" canon, when a statute refers to a general subject, the statute adopts the law on that subject as it exists whenever a question under the statute arises. 2 J. Sutherland, Statutory Construction §§5207–5208 (3d ed. 1943). For example, a statute allowing a company to "collect the same tolls and enjoy the same privileges" as other companies incorporates the law governing tolls and privileges as it exists at any given moment. *Snell* v. *Chicago*, 133 Ill. 413, 437–439, 24 N. E. 532, 537 (1890). In contrast, a statute that refers to another statute by specific title or section number in effect cuts and pastes the referenced statute as it existed when the referring statute was enacted, without any subsequent amendments. See, *e.g.*, *Culver* v. *People ex rel. Kochersperger*, 161 Ill. 89, 95–99, 43 N. E. 812, 814– 815 (1896) (tax-assessment statute referring to specific article of another statute does not adopt subsequent amendments to that article).

Federal courts have often relied on the reference canon, explicitly or implicitly, to harmonize a statute with an external body of law that the statute refers to generally. Thus, for instance, … a general reference to federal discovery rules incorporates those rules "as they are found on any given day, today included," *El Encanto, Inc.* v. *Hatch Chile Co*., 825 F. 3d 1161, 1164 (CA10 2016), and a general reference to "the crime of piracy as defined by the law of nations" incorporates a definition of piracy "that changes with advancements in the law of nations," *United States* v. *Dire*, 680 F. 3d 446, 451, 467–469 (CA4 2012).

The same logic applies here. The IOIA's reference to the immunity enjoyed by foreign governments is a general rather than specific reference. The reference is to an external body of potentially evolving law—the law of foreign sovereign immunity—not to a specific provision of another statute. The IOIA should therefore be understood to link the law of international organization immunity to the law of foreign sovereign immunity, so that the one develops in tandem with the other.

The IFC contends that the IOIA's reference to the immunity enjoyed by foreign governments is not a general reference to an external body of law, but is instead a specific reference to a common law concept that had a fixed meaning when the IOIA was enacted in 1945. And because we ordinarily presume that "Congress intends to incorporate the well-settled meaning of the common-law terms it uses," *Neder* v. *United States*, 527 U. S. 1, 23 (1999), the IFC argues that we should read the IOIA to incorporate what the IFC maintains was the then-settled meaning of the "immunity enjoyed by foreign governments": virtually absolute immunity.

But in 1945, the "immunity enjoyed by foreign governments" did not *mean* "virtually absolute immunity." The phrase is not a term of art with substantive content, such as "fraud" or "forgery." See *id*., at 22; *Gilbert* v. *United States*, 370 U. S. 650, 655 (1962). It is rather a concept that can be given scope and content only by reference to the rules governing foreign sovereign immunity. It is true that under the rules applicable in 1945, the *extent* of immunity from suit was virtually absolute, while under the rules applicable today, it is more limited. But in 1945, as today, the IOIA's instruction to grant international organizations the immunity "enjoyed by foreign governments" is an instruction to look up the applicable rules of foreign sovereign immunity, wherever those rules may be found—the common law, the law of nations, or a statute. In other words, it is a general reference to an external body of (potentially evolving) law.

C

In ruling for the IFC, the D.C. Circuit relied upon its prior decision in *Atkinson*, 156 F. 3d 1335. *Atkinson* acknowledged the reference canon, but concluded that the canon's probative force was "outweighed" by a structural inference the court derived from the larger context of the IOIA. *Id*., at 1341. The *Atkinson* court focused on the provision of the IOIA that gives the President the authority to withhold, withdraw, condition, or limit the otherwise applicable privileges and immunities of an international organization, "in the light of the functions performed by any such international organization." 22 U. S. C. §288. The court understood that provision to "delegate to the President the responsibility for updating the immunities of international organizations in the face of changing circumstances." *Atkinson*, 156 F. 3d, at 1341. That delegation, the court reasoned, "undermine[d]" the view that Congress intended the IOIA to in effect update itself by incorporating changes in the law governing foreign sovereign immunity. *Ibid*. We do not agree. The delegation provision is most naturally read to allow the President to modify, on a case-by-case basis, the immunity rules that would otherwise apply to a particular international organization. The statute authorizes the President to take action with respect to a single organization—"any such organization"— in light of the functions performed by "such organization." 28 U. S. C. §288. The text suggests retail rather than wholesale action, and that is in fact how authority under §288 has been exercised in the past. See, *e.g.*, Exec. Order No. 12425, 3 CFR 193 (1984) (designating INTERPOL as an international organization under the IOIA but withholding certain privileges and immunities); Exec. Order No. 11718, 3 CFR 177 (1974) (same for INTELSAT). In any event, the fact that the President has power to modify otherwise applicable immunity rules is perfectly compatible with the notion that those rules

might themselves change over time in light of developments in the law governing foreign sovereign immunity.

The D.C. Circuit in *Atkinson* also gave no consideration to the opinion of the State Department, whose views in this area ordinarily receive "special attention." *Bolivarian Republic of Venezuela* v. *Helmerich & Payne Int'l. Drilling Co*., 581 U. S. ___, ___ (2017) (slip op., at 9). Shortly after the FSIA was enacted, the State Department took the position that the immunity rules of the IOIA and the FSIA were now "link[ed]." Letter from Detlev F. Vagts, Office of the Legal Adviser, to Robert M. Carswell, Jr., Senior Legal Advisor, OAS, p. 2 (Mar. 24, 1977). The Department reaffirmed that view during subsequent administrations, and it has reaffirmed it again here.[2] That longstanding view further bolsters our understanding of the IOIA's immunity provision.

D

The IFC argues that interpreting the IOIA's immunity provision to grant anything less than absolute immunity would lead to a number of undesirable results.

The IFC first contends that affording international organizations only restrictive immunity would defeat the purpose of granting them immunity in the first place. Allowing international organizations to be sued in one member country's courts would in effect allow that member to second-guess the collective decisions of the others. It would also expose international organizations to money damages, which would in turn make it more difficult and expensive for them to fulfill their missions. The IFC argues that this problem is especially acute for international development banks. Because those banks use the tools of commerce to achieve their objectives, they may be subject to suit under the FSIA's commercial activity exception for most or all of their core activities, unlike foreign sovereigns. According to the IFC, allowing such suits would bring a flood of foreign-plaintiff litigation into U. S. courts, raising many of the same foreign-relations concerns that we identified when considering similar litigation under the Alien Tort Statute. See *Jesner* v. *Arab Bank, PLC*, 584 U. S. ___, ___–___ (2018); *Kiobel* v. *Royal Dutch Petroleum Co*., 569 U. S. 108, 116–117 (2013).

The IFC's concerns are inflated. To begin, the privileges and immunities accorded by the IOIA are only default rules. If the work of a given international organization would be impaired by restrictive immunity, the organization's charter can always specify a different level of immunity. The charters of many international organizations do just that. See, *e.g*., Convention on Privileges and Immunities of the United Nations, Art. II, §2, Feb. 13, 1946, 21 U. S. T. 1422, T. I. A. S. No. 6900 ("The United Nations … shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity"); Articles of Agreement of the International Monetary Fund, Art. IX, §3, Dec. 27, 1945, 60 Stat. 1413, T. I.

3 See Letter from Roberts B. Owen, Legal Adviser, to Leroy D. Clark, Gen. Counsel, EEOC (June 24, 1980) in Nash, Contemporary Practice of the United States Relating to International Law, 74 Am. J. Int'l. L. 917, 918 (1980) ("By virtue of the FSIA, and unless otherwise specified in their constitutive agreements, international organizations are now subject to the jurisdiction of our courts in respect of their commercial activities, while retaining immunity for their acts of a public character."); Letter from Arnold Kanter, Acting Secretary of State, to President George H. W. Bush (Sept. 12, 1992) in Digest of United States Practice in International Law 1016–1017 (S. Cummins & D. Stewart eds. 2005) (explaining that the Headquarters Agreement of the Organization of American States affords the OAS "full immunity from judicial process, thus going beyond the usual United States practice of affording restrictive immunity," in exchange for assurances that OAS would provide for "appropriate modes of settlement of those disputes for which jurisdiction would exist against a foreign government under the" FSIA); Brief for United States as *Amicus Curiae* 24–29.

A. S. No. 1501 (IMF enjoys "immunity from every form of judicial process except to the extent that it expressly waives its immunity"). Notably, the IFC's own charter does not state that the IFC is absolutely immune from suit.

Nor is there good reason to think that restrictive immunity would expose international development banks to excessive liability. As an initial matter, it is not clear that the lending activity of all development banks qualifies as commercial activity within the meaning of the FSIA. To be considered "commercial," an activity must be "the *type*" of activity "by which a private party engages in" trade or commerce. *Republic of Argentina* v. *Weltover, Inc.*, 504 U. S. 607, 614 (1992); see 28 U.S.C. §1603(d). As the Government suggested at oral argument, the lending activity of at least some development banks, such as those that make conditional loans to governments, may not qualify as "commercial" under the FSIA. …

And even if an international development bank's lending activity does qualify as commercial, that does not mean the organization is automatically subject to suit. The FSIA includes other requirements that must also be met. For one thing, the commercial activity must have a sufficient nexus to the United States. See 28 U. S. C. §§1603, 1605(a)(2). For another, a lawsuit must be "based upon" either the commercial activity itself or acts performed in connection with the commercial activity. See § 1605(a)(2). Thus, if the "gravamen" of a lawsuit is tortious activity abroad, the suit is not "based upon" commercial activity within the meaning of the FSIA's commercial activity exception. See *OBB Personenverkehr AG* v. *Sachs*, 577 U. S. ___, ___–___ (2015); *Saudi Arabia* v. *Nelson*, 507 U. S. 349, 356–359 (1993). At oral argument in this case, the Government stated that it has "serious doubts" whether petitioners' suit, which largely concerns allegedly tortious conduct in India, would satisfy the "based upon" requirement. … In short, restrictive immunity hardly means unlimited exposure to suit for international organizations.

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The International Organizations Immunities Act grants international organizations the "same immunity" from suit "as is enjoyed by foreign governments" at any given time. Today, that means that the Foreign Sovereign Immunities Act governs the immunity of international organizations. The International Finance Corporation is therefore not absolutely immune from suit.

The judgment of the United States Court of Appeals for the D. C. Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

* * * *

As directed by the Supreme Court, the case was remanded to the district court, and on September 13, 2019, the United States filed a statement of interest to convey its view that the lawsuit did not fall within the FSIA's commercial activity exception to immunity. *Jam v. Int'l Fin. Corp.*, No. 15-cv-00612 (D.D.C 2019). The lawsuit was filed by farmers, fishermen, a village, and a trade union in India, alleging that the construction of a power plant in Gujarat, India—financed in part by the IFC—socially and environmentally damaged their community. Excerpts follow from the U.S. statement of interest, which is available in full at https://www.state.gov/digest-of-united-states-practice-in-international-law/.

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I. IFC's Alleged Conduct Does Not Come Within The FSIA's Commercial Activity Exception.

The FSIA governs the circumstances under which international organizations that have been designated by Executive Order are immune from suit in courts in the United States. *Jam*, 139 S. Ct. at 772. The Act establishes that foreign states shall be immune from suit in U.S. courts unless one of the Act's express exceptions to immunity applies. 28 U.S.C. § 1604. One of these exceptions, known as the commercial activity exception, provides that

> [a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case … in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2). By requiring that the lawsuit be "based upon" acts in the United States or causing a direct effect in the United States, the commercial activity exception permits suits against foreign sovereigns only where a sufficient nexus exists between the United States and the allegations giving rise to the action. *See* H.R. Rep. No. 1487, 94th Cong., 2d Sess. 18 (1976) (referring to § 1605(a)(2) as encompassing "[c]ommercial activities having a nexus with the United States"). Here, plaintiffs rely on the first two prongs of the exception, asserting that their action is "based upon" IFC's commercial activity in the United States and conduct in the United States in connection with commercial activity outside of the United States. Compl. ¶ 195. But as set forth below, their arguments are squarely foreclosed by Supreme Court precedent.

In *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390 (2015), the Supreme Court explained how to determine whether the action is "based upon" acts in the United States. According to the Court, for purposes of the exception, "an action is 'based upon' the 'particular conduct' that constitutes the 'gravamen' of the suit." *Id.* at 396. The plaintiff in *Sachs*, a U.S. citizen, had purchased a railway pass in the United States, over the Internet, and then traveled to Austria, where she was injured when she slipped and fell while boarding an Austrian state-owned railway. *Id.* at 393. The plaintiff argued that her causes of action were "based upon" her purchase of the railway pass in the United States because the sale of the pass in the United States was an element of each of her claims. But the Court rejected that argument, and concluded that "the conduct constituting the gravamen" of the complaint "plainly occurred abroad," thus failing § 1605(a)(2)'s territorial-nexus requirement. *Id.* at 396. The Court stressed that all of the plaintiff's claims turned "on the same tragic episode in Austria, allegedly caused by wrongful conduct and dangerous conditions in Austria, which led to injuries suffered in Austria." *Id.*

The Court's reasoning in *Sachs* relied heavily upon its earlier decision in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993). The plaintiffs in *Nelson*, a married couple, sued Saudi Arabia and its state-owned hospital for torts against the husband, allegedly in retaliation for his reporting of hazards at the hospital where he had worked (in Saudi Arabia) after being recruited and hired (in the United States) by the defendants. *Id.* at 352–54. The Court concluded that, although the

husband's recruitment and hiring in the United States to work at the hospital "led to the conduct that eventually injured" him, those actions were "not the basis" for the lawsuit. *Id.* at 358. Rather, it was the husband's jailing and alleged torture in Saudi Arabia that formed the gravamen of the complaint. *Id.* The Court emphasized that "[e]ven taking each of the [plaintiffs'] allegations about [the] recruitment and employment as true, those facts alone entitle the [plaintiffs] to nothing under their theory of the case." *Id.* Further, although there were 16 causes of actions at issue in *Nelson*, the Court "did not undertake an exhaustive claim-by-claim, element-by-element analysis," but instead "zeroed in on the core of their suit: the Saudi sovereign acts that actually injured them." *Sachs*, 136 S. Ct. at 396.

Like in *Sachs* and *Nelson*, the "gravamen" of plaintiffs' lawsuit here is tortious activity that allegedly took place and injured plaintiffs outside of the United States. The conduct alleged to have caused plaintiffs' injuries—the construction and operation of the power plant—occurred in India. It is that conduct that forms the core of the lawsuit, and without it, there would be nothing for which to recover. The complaint alleges that "numerous critical decisions relevant to whether to finance the Tata Mundra Project, and under what conditions," were made in the United States, and that IFC's funding for the project likewise was disbursed in the United States. Compl. ¶ 197– 98. But even taking those allegations as true, "those facts alone entitle the [plaintiffs] to nothing under their theory of the case." *Nelson*, 507 U.S. at 358.

Moreover, although IFC's decision to finance the project and its disbursement of funds is a link in the chain of events that "led" to the harm described in the complaint, the "gravamen" of the lawsuit still is conduct in India. As the Supreme Court explained in *Sachs*, "the essentials of a personal injury narrative will be found at the point of contact." 136 S. Ct. at 397 (citation omitted). Here, the construction and operation of the power plant—not IFC's financing—are what "actually injured" the plaintiffs. *Id.* at 396. Like the sale of the train ticket in *Sachs* or the recruitment and hiring in *Nelson*, IFC's loan to the Indian company CGPL is an antecedent step that alone cannot entitle the plaintiffs to relief. *See Nelson*, 507 U.S. at 358 (explaining that the "torts, and not the arguably commercial activities that preceded their commission, form the basis for the [plaintiffs'] suit").

Plaintiffs attempt to escape the geographical thrust of this action by alleging that "IFC's responses to allegations of harm caused by the Project … were decided, directed and/or approved from the headquarters in Washington, D.C." Compl. ¶ 199. They assert that IFC's internal compliance ombudsman identified many of the environmental and social harms asserted by the plaintiffs, and that IFC in Washington thereafter failed to remedy the injuries. *Id.* ¶ 153–56, 299, 300. But this theory fares no better. The "core" of plaintiffs' suit, *Sachs*, 136 S. Ct. at 396, remains CGPL's construction and operation of the plant—the conduct giving rise to plaintiffs' injuries. That conduct serves as the "foundation for … [plaintiffs'] claims and, therefore, also the gravamen of [their] suit." *Nnaka v. Fed. Republic of Nigeria*, 238 F. Supp. 3d 17, 28 (D.D.C. 2017) (Bates, J.). Even if IFC's response to the harms could have mitigated them in some fashion, it is still the events in India that form the "essentials" of the lawsuit, and without which plaintiffs would suffer no injury. *Sachs*, 136 S. Ct. at 397.

It makes no difference that the plaintiffs plead claims for negligence and negligent supervision, which purport to be based on IFC's alleged failure to take steps in the United States to prevent or mitigate the harm in India. Compl. ¶ 294–306. The Supreme Court rejected similar attempts at "artful pleading" in *Sachs* and *Nelson*. *Sachs*, 136 S. Ct. at 396 (rejecting argument based on strict liability claim for failure to warn, because "however Sachs frames her suit, the incident in [Austria] remains at its foundation"); *Nelson*, 507 U.S. at 363 (similarly rejecting

argument based on failure to warn claim as "merely a semantic ploy" and a "feint of language"). The same holds true for the plaintiffs' third-party beneficiary claim for breach of contract. Compl. ¶ 325–332. Indeed, the plaintiff in *Sachs* brought claims for breach of implied warranties of merchantability and fitness, which sounded in contract, but the Court nevertheless deemed the gravamen of the suit to be the "wrongful conduct and dangerous conditions in Austria." *Sachs*, 136 S. Ct. at 396; *cf. Nnaka*, 238 F. Supp. 3d. at 29 ("Although Nnaka's complaint includes a claim for breach of contract, it sounds substantially—maybe even primarily—in tort."). It would be contrary to the Supreme Court's reasoning in *Sachs* and *Nelson* to permit plaintiffs to evade the FSIA's restrictions by recasting actions in India as a negligent failure to act or breach of contract in the United States.

Nor does it matter that plaintiffs have decided to sue only IFC in this action. Plaintiffs insist that the "gravamen" analysis must focus on the actions of the named defendant, and not nonparties (such as CGPL). … But the fact that plaintiffs named only IFC, which did not itself build or operate the plant that allegedly harmed the plaintiffs, cannot shift the gravamen of the lawsuit to IFC's actions in Washington. The lawsuit still is "based upon" conduct which caused harm in India, regardless of whether the plaintiffs choose to sue other defendants. More generally, a plaintiff cannot gerrymander the "gravamen" analysis by declining to name a party that directly caused the harm and instead naming only an entity that is steps removed. Such an approach would make little sense, particularly given the purpose of the "based upon" requirement to allow suits against foreign sovereigns (or international organizations) only where a sufficient nexus exists between the United States and the allegations at the center of the action. *See Nelson*, 507 U.S. at 357 (reading the phrase "based upon" as demanding "something more than a mere connection with, or relation to").

At bottom, the allegations in this case turn on and center around allegedly tortious conduct by a private party that took place in another country and resulted in injuries abroad. IFC's actions in the United States are not the basis or core of plaintiffs' lawsuit. Accordingly, the allegations of this case fall outside the bounds of the commercial activity exception.

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Cross References

ILC's work on Immunity of State Officials from Foreign Criminal Jurisdiction, **Ch. 7.C.2.**
Investor-State dispute resolution (including expropriation), **Ch. 11.B.**